Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ABATE OF GEORGIA, INC.
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners
v.
STATE OF GEORGIA AND
GEORGIA DEPARTMENT OF PUBLIC SAFETY ET AL

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a decision by the Appellate Court of Georgia, which upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature versus applying a judicial limned viewpoint of a statute which conflicts with the plain meaning and intent of a statute may be set aside by the federal judiciary, when the decision by the State of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. Whether, in consideration of the Eleventh Amendment and Georgia law, claims against state agencies under state law claims, which are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.

III. Whether Appellees, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.

IV. Whether the Eleventh Circuit Court of Appeals erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

V. Whether the Eleventh Circuit Court of Appeals erred by finding that the Appellees have complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

VI. Whether the Eleventh Circuit Court of Appeals erred by failing to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

VII. Whether the Eleventh Circuit Court of Appeals erred by granting the Appellees' Motion to Dismiss.

VIII. Whether the Eleventh Circuit Court of Appeals erred by denying Petitioner/Appellant's Motion for Rehearing.

LIST OF PARTIES

Respondent/Defendants:

ROONEY L. BOWEN, III, in his Official and Individual Capacity as a Member of the Board of Public Safety,

ROY E. BARNES, in behalf of the STATE OF GEORGIA,

ROBERT E. HIGHTOWER, in behalf of the GEORGIA DEPARTMENT OF PUBLIC SAFETY, in his Official and Individual Capacity,

ROONEY L. BOWEN, III, in his Official and Individual Capacity as a Member of the Board of Public Safety,

JIM WETHERINGTON, in his Official and Individual Capacity as a Member of the Board of Public Safety,

CHIEF HUBERT L. SMITH, in his Official and Individual Capacity as a Member of the Board of Public Safety,

CHIEF REBECCA F. DENLINGER, in her Official and Individual Capacity as a Member of the Board of Public Safety,

DANIEL M. BRYANT, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF JACQUELYN H. BARRETT, in her Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF BRUCE HARRIS, in his Official and Individual Capacity as a Member of the Board of Public Safety,

ROBERT E. KELLER, in his Official and his Individual Capacity as a Member of the Board of Public Safety,

LYDIA J. SARTAIN, in her Official and Individual Capacity as a Member of the Board of Public Safety,

W.H. "DUB" HARPER, JR., in his Official and Individual Capacity as a Member of the Board of Public Safety,

WAYNE ABERNATHY, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF DONNIE HARALSON, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF GREOGORY T. COURSEY, in his Official and Individual Capacity as a Member of the Board of Public Safety,

SHERIFF JAMIL SABA, in his Official and Individual Capacity as a Member of the Board of Public Safety,

BOARD OF PUBLIC SAFETY, and
UNKNOWN CITY, COUNTY AND STATE LAW ENFORCEMENT AGENTS,

Petitioner/Plaintiff:

ABATE of Georgia, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner, ABATE of Georgia, Inc., is a Georgia corporation with no parent corporation and with no publicly held company owning more than ten-percent of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW (i)

LIST OF PARTIES (iii)

CORPORATE DISCLOSURE STATEMENT (v)

TABLE OF CONTENTS (vi)

TABLE OF AUTHORITIES (ix)

CERTIFICATE OF TYPE SIZE AND STYLE (xii)

SUMMARY OF ARGUMENT (1)

ARGUMENT AND CITATION OF AUTHORITY (3)

The Appellate Court erred when it determined that it would be improper to undercut the Georgia Appellate Court decision in Dowis v. State, 243 Ga. App. 354 (2000), when that decision by the Appellate Court of Georgia, upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicial limned viewpoint of a statute which conflicts with the plain meaning and intent of a statute, and when;

I. The decision by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. **The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.** (9)

III. **The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.** (13)

IV. **The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.** (17)

V. **The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.** (18)

VI. **The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.**(20)

VII. **The Appellate Court erred when it granted the Appellees' Motions to Dismiss.** (21)

VIII. **The Appellate Court erred by denying Petitioner/Appellant's Motion for Rehearing.**

(23)

CONCLUSION

(23)

TABLE OF AUTHORITIES

TABLE OF CASES AND CITATIONS

Citation	Page
Adler v. Duval County School Bd., 206 F.3d 1070 (11th Cir. 2000)	6
Barnett v. Bailey, 956 F.2d 1036 (11th Cir. 1992)	19
Bennett v. Wood, 188 Ga. App. 630 (1988)	7, 9
Blessing v. Freestone, 520 U.S. 329 (1997)	5
Church v. City of Huntsville, 20 F.3d 1332 (11th Cir.1994)	19
Dowis v. The State, 243 Ga. App. 354 (2000)	1, 2, 3, 8, 9
Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996)	13
Ex Parte Young, 209 U.S. 123 (1908)	14
Gilbert v. Richardson, 264 Ga. 744 (1994)	7, 9
Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000)	5
Harris v. Garner, 190 F.3d 1279, 1284 (11th Cir. 1999)	6
Holmes v. Chatham Area Transit, 234 Ga. App. 42, 44 (1998)	6, 9
In Re Employment Discrimination Litigation, 198 F.3d 1305 (11th Cir. 2000)	14
McKusick v. City of Mulbourne, Fla, 96 F.3d 478 (11th Cir. 1996)	19
Kolender v. Larson, 461 U.S. 352 (1983)	20
Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174	

(11th Cir.1993) 12, 19

McDonald's Corp. v. Robertson,
147 F.3d 1301, 1306 (11th Cir. 1998) 19

Moritz v. Orkin Exterm. Co.,
215 Ga. App. 255 (1994) 6, 9

Peterson v. BMI Refractories,
132 F.3d 1405 (11th Cir.1998) 10

Picou v. Gillum, 874 F2d 1519 (11th Cir. 1989) 20

Port Auth. Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 10

Salinas v. United States,
522 U.S. 52, 57-58 (1997) 6

Saucier v. Katz, 533 US __ (2001) 11

Tally-Ho, Inc. v. Coast Community College Dist.,
889 F.2d 1018 (11th Cir. 1989) 19

United States v. Davis, 36 F.3d 1424 (9th Cir. 1994),
cert. denied, 115 S.Ct. 1147 (1995) 21

United States Doremus, 888 F.2d 630
(9th Cir. 1989) 21

United States v. Martinez, 49 F.3d 1398
(9th Cir. 1995), cert. denied, 116 S.Ct. 749 (1996) 21

United States. Parratt v. Taylor,
451 U.S. 527 (1981) 13

United States v. Ron Pair Enters.,
489 U.S. 235 (1989) 5

Village of Hoffman Estates v. The Flipside,
Hoffman Estates, Inc., 455 U.S. 489 (1982) 20

STATUTORY CITATION - FEDERAL

Title 42 U.S.C., Section 1983 11

CONSTITUTIONAL AMENDMENTS

First Amendment 10

Fifth Amendment **10**
Eleventh Amendment **1, 2, 9, 10,11, 14**

Fourteenth Amendment **10**

STATUTORY CITATION - STATE OF GEORGIA

O.C.G.A., Section 40-10-3 **15**

O.C.G.A., Section 40 -6-315 **Throughout Brief**

O.C.G.A., Section 40-6-315(a) **Throughout Brief**

O.C.G.A., Section 40-6-315(b) **Th roughout Brief**

O.C.G.A., Section 40-6-315(c) **Throughout Brief**

O.C.G.A., Section 40-6-315(d) **Throughout Brief**

O.C.G.A., Section 50-21-26 **10, 11**
O.C.G.A., Section 51-12-5.1(b) **10,**

CERTIFICATE OF TYPE SIZE AND STYLE

Petitioner respectfully advances that Petitioner has used 12 point Times New Roman for Petitioners application for Writ of Certiorari.

PETITION FOR WRIT OF CERTIORARI

COMES NOW ABATE OF GEORGIA, INC., Appellant, by and through undersigned counsel, and tenders Plaintiff/Appellant's Petition for Writ of Certiorari from the Eleventh Circuit Court of Appeals and shows this Honorable Court as follows:

SUMMARY OF ARGUMENT

For thirty-two (32) years the State of Georgia, the Appellees and via the various local and state law enforcement departments have been illegally enforcing O.C.G.A. § 40-6-315, against persons operating motorcycles in the State of Georgia. While the State of Georgia mandated statutory compliance upon the part of its citizens under the term "shall" pursuant to O.C.G.A. § 40-6-315(a) and (b), the State of Georgia has illegally taken the same mandatory language of "shall" upon the part of the State of Georgia, via the Board of Public Safety, to be discretionary and/or not requiring them to act as mandated pursuant to O.C.G.A. § 40-6-315(d).

The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees. O.C.G.A. § 40-6-315 contains four (4) distinctive subparts, expressed here in full, to wit:

> "(a) No person **shall** operate or ride upon a motorcycle unless he is wearing protective headgear which complies with standards established by the Board of Public Safety.
>
> (b) No person **shall** operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he is wearing an eye-protective device of a type approved by the Board of Public Safety.
>
> (c) This Code section **shall** not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to persons operating a three-wheeled motorcycle used only for agricultural purposes.
>
> (d) The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations

establishing standards and specifications for the approval thereof. The Board of Public Safety **shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**"
(O.C.G.A. § 40-6-315)(Emphasis Added).

The Appellate Court, in rendering judgment for the Appellees, adopted the District Court's admission that, "**it is undisputed that the Board of Public Safety has not published a list of all protective headgear and eye-protective devices by name and type which have been approved by it.**" (D-31., Page 4.) On the face of it, the Appellate Court's decision unnaturally eviscerates the plain language of the statute. Particularly the mandatory language "shall" as it applies to Appellees. The lower courts admitted, that the Appellees had not complied with the mandatory provisions of O.C.G.A. § 40-6-315(d), but nonetheless, both courts ruled in favor of Appellees. Furthermore, the Appellees have plainly and stated, ". . . **we have not publish[ed] lists of all protective headgear and eye-protective devices by name and type...[and we] are not going to do it!**"

The Eleventh Circuit in Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc), has further stated that the **"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should `enforce [the statute] according to its terms.'"** Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

It is Petitioner's position, supported by the Appellee's acquiescence and failure to challenge Appellant's position, that the lower courts erred in finding that, the mere adoption of corresponding federal manufacturing regulations was totally compliant with the mandatory language of the statute under challenge. These guidelines were established for manufacturers to "self-govern" themselves not for compliance by the general public, who in most cases are unaware of such provisions. It is also a logical conclusion that "to publish list of all protective headgear ... approved by it" is not the

equivalent of the mere adoption of corresponding federal manufacturing regulations. **Adopting some other formulaic regulation is not a "list of all protective headgear and eye-protective devices by name and type which have been approved."**

Jurisdiction is by discretionary review by Certiorari regarding interpretation of the laws of the State of Georgia and the United States pursuant to alleged violations of Petitioner's rights guaranteed under the United States Constitution. Petitioner seeks the review of the decision of the United States Court of Appeals for the Eleventh Circuit, whereby the Court of Appeals denied Appellant's Petition for Reconsideration on November 9, 2001.

It is Appellant's position that the lower courts committed at least eight (8) errors when it granted the Appellees' motion to dismiss. Petitioner/Appellant advances the following specific grounds, to wit:

I. The Appellate Court erred when it determined that it would be improper to undercut the Georgia Appellate Court decision in Dowis v. State, 243 Ga. App. 354 (2000), when that decision by the Appellate Court of Georgia, upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute which conflicts with the plain meaning and intent of a statute, and when the decision by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

II. The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.

III. The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the case.

IV The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

V. The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

VI. The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

VII. The Appellate Court erred when it granted the Appellees' Motions to Dismiss.

VIII. The Appellate Court erred when it denied the Appellant's Petition for Rehearing.

ARGUMENT AND CITATION OF AUTHORITY

I. **The Appellate Court erred when it determined that it would be improper to undercut the Georgia Appellate Court decision in Dowis v. State, 243 Ga. App. 354 (2000), when that decision by the Appellate Court of Georgia, upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute which conflicts with the plain meaning and intent of a statute, and when the decision**

by the Appellate Court of Georgia violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution.

The Honorable Panel in the Appellate Court adopted the decision rendered by the District Court as rendered by the Georgia Court of Appeals in Dowis v. State, advancing as its reasoning, that to void the same would undercut that decision rendered by the Georgia Court of Appeals.

It is Petitioners' position that the federal judiciary has the legal and lawful right and duty to set aside any decision by the State of Georgia, which violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution. Dowis upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature, versus applying a judicially painted viewpoint of a statute, which conflicts with the plain meaning and intent of a statute, as does the Dowis decision.

The Georgia Legislature passed the O.C.G.A. § 40-6-315 and it was signed into law. The purpose of the instant statute was to provide the citizens of the State of Georgia with the knowledge and ability to determine whether a citizen's legal activities, relating to the operation of a motorcycle, was in compliance with the instant statute.

Logically the Georgia Legislature, provided the Georgia Department of Public Safety with the discretion to determine the appropriate headgear and eye-protective gear which would meet the statutory requirements and demanded, pursuant to the term "shall" that **"[T]he Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it."** While the Appellees have formulated the testing and construction basis for headgear and eye-protective devices, they have in fact under current laws, required that the citizens of the State of Georgia, without access to such, make a self determination whether their equipment meets the statutory requirements without complying with the mandatory part of the instant statute.

The absolutely clear statutory purpose of § 40-6-315(d), was for the Georgia Department of Public Safety, by and through the Board of Public Safety, to have the discretion to determine minimum standards for headgear and eye-protective devices and to determine the products for sale to the general public, within the State of Georgia, that have met those standards **and thereafter publish a list** of the same so that the citizens of Georgia could readily determine whether they are in compliance.

The Appellees have willfully and deliberately voided, evaded and abrogated the statutory language of O.C.G.A. § 40-6-315(d) and illogically contends that the Appellees conduct pursuant to the statute is constitutionally valid and therefore not open to any legal challenge by Appellant. The lower courts committed error by accepted this position as evidenced by the dismissal of Plaintiff/Appellant's case.

O.C.G.A. § 40-6-315(a) and (b), demands that the citizens "shall" comply with the requirements of each of the statutory mandates set for in each statutory provision.

The Appellees have demanded and continue to demand and enforce its will upon the citizens of the State of Georgia through the inherent language of the statute. However, the State of Georgia, Georgia Department of Public Safety, through the Board of Public Safety have willfully and deliberately refused to abide by it's mandated obligations as imposed by the language of O.C.G.A. § 40-6-315(d). Instead, the Appellees through the State's highest legal authority, the Attorney General's Office, has taken the position that mandatory language of the statute in question is only discretionary versus the plain language of the statute which imposes mandatory obligations upon the State of Georgia relating to the totality of the statute.

The Appellate Court, in rendering judgment for the Appellees, adopted the District Court's admission that, "**it is undisputed that the Board of Public Safety has not published a list of all protective headgear ... approved by it.**" (D-31., Page 4.) On the face of it, the Appellate Court's decision unnaturally eviscerates the plain language of the

statute. Particularly the mandatory language "shall" as it applies to Appellees. The lower courts admitted, that the Appellees had not complied with the mandatory provisions of O.C.G.A. § 40-6-315(d), but nonetheless, both courts ruled in favor of Appellees.

Abrogation versus Precatory

In Blessing v. Freestone, 520 U.S. 329, 341 (1997), this Honorable Court, in looking at the construction of a statute that compels a governmental agency to act has stated that **the statute must unambiguously impose a binding obligation on the governmental body in question.**

The clear and unambiguous language of O.C.G.A. § 40-6-315(d), clearly mandates under the legal term "shall" that the "[T]he Board of Public Safety **shall publish lists** of all protective headgear ... *approved by it.*"

The Eleventh Circuit in Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc), has further stated that the **"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then our interpretative function ceases and we should 'enforce [the statute] according to its terms.'"** Griffith v. United States (In re Griffith), 206 F.3d 1389, (11th Cir. 2000) (en banc) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989).

The logical purpose for which the Georgia Legislature passed O.C.G.A. § 40-6-315(d) was so that the very situation that now exists, would not arise. A person who operates a motorcycle within the legal parameters pursuant to O.C.G.A. § 40-6-315(a) and (b) would know, pursuant to **a published list of all approved, protective headgear and eye-protective devices**, which precisely it was lawful to wear while operating a motorcycle. However, instead, the State of Georgia has committed itself to the willful evasion and deliberate abrogation of the legal language of O.C.G.A. § 40-6-315(d), and illegally has declared that the mandatory requirement of the Board of Public Safety to "... **publish lists** of all protective headgear ... approved by it" is a solely discretionary

function upon its part, and that the Appellees may not comply with in their sole discretion.

The plain language of O.C.G.A. § 40-6-315(d), is absolutely clear. Under no stretch of the legal imagination should the Board of Public Safety be permitted to treat the statutory language of O.C.G.A. § 40-6-315(d), with the lawful authority to consider the language of that statute to empower them with **discretionary, abrogational or precatory authority** to avoid the mandatory requirements imposed by the Georgia Legislature pursuant to O.C.G.A. § 40-6-315(d) to ". . . **publish lists** of all protective headgear … approved by it."

Petitioner respectfully advances that the lower courts' determinations, as affirmed by the Appellate Court, that amendments to O.C.G.A. § 40-6-315, by the Georgia General Assembly substituting the newly created Commissioner of Motor Vehicle Safety as the applicable regulatory authority in place of the Board of Public Safety, effective July 1, 2001, mitigate the circumstances and violations plead in this action. It has absolutely no relevancy to whether or not the Appellees have violated the law. (D-31-Page 3.). Some future act, which may change whom violates or does not violate the law is not relevant to the acts and actions, which have occurred to date. See Adler v. Duval County School Bd., 206 F.3d 1070 (11th Cir. 2000): Harris v. Garner, 190 F.3d 1279, 1284 (11th Cir. 1999)(Absent mistake or absurdity, we implement the statutory language as enacted); Salinas v. United States, 522 U.S. 52, 57-58 (1997).

The Georgia judicial system has likewise adhered to the same legal line of statutory construction and interpretation as recognized by the federal judiciary. The Georgia Supreme Court in Holmes v. Chatham Area Transit, 234 Ga. App. 42, 44 (1998), found that:

> "[I]t is axiomatic that if an enactment is plain and unambiguous, we must give its words their plain and ordinary meaning, except for words which are terms of art or have a particular meaning in a specific context. We must seek "to give meaning to each part of the statute and to avoid constructions which render a portion of the statute mere surplusage."

The Georgia Court of Appeals in Moritz v. Orkin Exterm. Co., 215 Ga. App. 255, 256-257 (450 S.E.2d 233) (1994), found:

> "[A] statute must be construed in relation to other statutes of which it is a part, and all statutes relating to the same subject-matter, briefly called statutes "in pari materia," are construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto."

Citing, Bennett v. Wood, 188 Ga. App. 630, 632 (1) (373 S.E.2d 645) (1988).

Finally, "[i]t is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning." (Punctuation omitted.) Gilbert v. Richardson, 264 Ga. 744, 747-748 (3) (1994).

The Appellees have ignored the clear and plain language of O.C.G.A. § 40-6-315(d), and the lower courts have likewise accepted their legal position and ruled that since the law is going to be changed in the future, that the Appellant's legal arguments are without merit. Logically, if the State of Georgiapursuant to O.C.G.A. § 40-6-315(a) and (b) will not allow its citizens to declare the mandatory term "shall" to be discretionary as to compliance, then, the same legal and logical basis of the demand that the term "shall" in O.C.G.A. § 40-6-315(d), also mandates a duty which must be fulfilled by the State of Georgia through the Board of Public Safety. The State of Georgia cannot abrogate O.C.G.A. § 40-6-315(d) while taking the opposite legal position as to O.C.G.A. § 40-6-315(a) and (b) and declare that the mandatory term "shall." **It should not be approved by this Honorable Court, that within a single statute, the word "shall" is mandatory in one subsection, but permissive in another sub-section *of the same statue*.**

Petitioner respectfully moves for this Honorable Court's consideration of comparative analysis between the statute under challenge

and a statute, while no law would have the same application of law and logic. For instance assume that the State of Georgia mandated, pursuant to the following statute that the citizens of the State of Georgia were, due to environmental pollution, to use a specific type of gas and safety devices in their motor vehicles, to wit:

A. No person **shall** operate a motor vehicle within the State of Georgia unless the vehicle is equipped with air bags and seat belts approved by the Commissioner of Motor Vehicle Safety.

B. This Code section **shall** not apply to persons operating motor vehicles within the interstate highway system whose occupants are not citizens of the State of Georgia.

C. The Commissioner of Motor Vehicle Safety is authorized to approve or disapprove all air bags and seat belts, which meet the requirements of this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Commissioner **shall publish lists of all air bags and set belt devices by name and type approved by the Commissioner.**

If the Commissioner of Motor Vehicle Safety instead of publishing a list of air bags and seat belts by name and type, which meet the statutory requirement of the aforementioned statute, only adopted rules and regulations, as done in the present case, **how would the citizens of the State of Georgia know whether or not they were in compliance with the law?** The answer to that question is the same as in the present case, a citizen would not know if the air bag or seat belt met the statutory requirements.

The lower courts referred to the decision by the Georgia Court of Appeals in Dowis in which the Georgia Court of Appeals ruled that the Appellees do not have to comply with the plain and mandatory language of the statute in question.

While the Appellees have sought the protection of the decision by the Georgia Court of Appeals in Dowis, Petitioner respectfully advances that the Dowis decision is inherently defective and goes against Gilbert v. Richardson, 264 Ga. 744 (1994), as well as in Holmes v. Chatham Area Transit, 234 Ga. App. 42 (1998); Moritz v. Orkin Exterm. Co., 215 Ga. App. 255 (1994); Bennett v. Wood, 188 Ga. App. 630 (1988).

Petitioner respectfully advances that the decision rendered in Dowis Court goes against the statutory language of the statute in question and that decision is erroneous in the face of the absolutely plain language and purpose of the statute. If Dowis is lawful, then it is lawful for the citizens of the State of Georgia to declare that O.C.G.A. § 40-6-315(a) and (b), are likewise discretionary upon the part of the citizens to which it may be applicable. Petitioner respectfully advances that the Georgia Court of Appeals in Dowis, **promotes disrespect for the law**, because the State of Georgia is advancing the legal theory that the citizens are to do what the State of Georgia says,
but the State of Georgia is not required to follow the same laws by which they demand absolute compliance by its citizens.

II **The Appellate Court erred when it dismissed this action, based in consideration of the Eleventh Amendment of the United States and Georgia law, which claims were against state agencies under state law, which claims are supported by the tendering of the required ante litem notices to the individual state agencies, which under Georgia law legally strips the an agency of immunity issues and defenses and acts as a waiver of Eleventh Amendment immunity, where state law claims provide for damages against the agency.**

Appellees have not challenged, nor refuted, that the Petitioner timely filed ante litem notices. Likewise, the Appellees have not challenged Petitioner's position, as advanced below, such ante litem notices, waived the Appellees' Eleventh Amendment rights so that a state law claim can be

raised and prosecuted. Appellees have instead merely recited that the Eleventh Amendment of the United States Constitution, protects against suits against state officials in their official capacity and nothing else whatsoever. Likewise, the Appellees have not argued that Georgia's ante litem statutes do not waive their Eleventh Amendment rights, rather they have instead chosen to ignore this Petitioner's claims and hope that the judiciary chooses not to address the issue in its decision.

Petitioner attacks the lower courts' determinations that the Appellees are protected pursuant to the Eleventh Amendment of the United States Constitution. Petitioner respectfully advance that the Appellate Court erred when it affirmed the District Court in determining that the Eleventh Amendment foreclosed Appellant's claims against the named agency Appellees. Petitioners' Second Amended Complaint, clearly states the grounds upon which the Petitioner was advancing jurisdiction before the lower court, to wit:

> "Plaintiff asserts statutory jurisdiction pursuant to Title 28, United States Code § 1331. Additional jurisdiction is anchored pursuant to Title 42, United States Code § 1983, and First, Fifth, Fourteenth Amendments of the United States Constitution. **Plaintiff has tendered such ante litem notices which waives immunity to said state agency pursuant to Georgia Tort Claims Act as with OCGA § 50-21-26, and jurisdiction pursuant to OCGA § 51-12-5.1(b)**" (Emphasis Added)(D-10., Page 4. and 5.).

Petitioner conceded that federal claims, totally pursuant to Title 42, U.S.C. § 1983, do not pierce the immunity issues pursuant to the Eleventh Amendment of the United States Constitution, against the state agencies named in the Appellant's Second Amended Complaint. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

However, Petitioner respectfully asserts that the Petitioner/Appellant clearly and distinctly raised state law claims against the Appellee agencies in the Petitioner/Appellant's Second Amended Complaint. Likewise, Petitioner/Appellant stated the statutory provisions under which the

Appellant was pursuing Appellant's state law claims. (D-10, Page 4. and 5.). It is Petitioners' position that lower court could have and should have recognized the Appellant's state law claims and erred by not doing so.

The federal courts, particularly, the Eleventh Circuit, have repeatedly recognized the right of litigants to raise state law claims and federal claims in suits filed in the federal forum. Peterson v. BMI Refractories, 132 F.3d 1405 (11th Cir. 1998).

In the face of the Petitioner/Appellant's clear assertion of state law claims, the lower court ignored the Appellant's legal claims against the Appellee agencies, under state law, as advanced pursuant to Appellant's invoking such legal rights pursuant to Georgia's ante litem notices as codified pursuant to O.C.G.A. § 50-21-26 and O.C.G.A. § 51-12-5.1(b). Instead the lower courts have erroneously advanced, pursuant to Appellant's 1983 claims, that the Eleventh Amendment forecloses Petitioner/Appellant's claims against the instant state agencies.

Petitioner respectfully advances that the claims against the Appellee agencies, by the receipt of the Petitioner's ante litem notices, clearly waived the Appellee agencies' Eleventh Amendment rights as to the Petitioner/Appellant's claims against them. Petitioner respectfully advances that the Appellate Court, in affirming the District Court erroneously mixed up and legally dumped the Appellant's state law claims into the Appellant's federal law claims raised pursuant to Title 42, U.S.C. § 1983.

Petitioner respectfully advances, based upon the Appellees' failure to address the Appellant's legal claims relating to the ante litem issues, that the Appellees have legally conceded in acquiescence that the Appellant's claims have merit and that the lower court erred in not recognizing this.

III. **The Appellate Court erred when it held that, individual actors are protected by immunity under the Eleventh Amendment of the United States Constitution, when the clear evidence indicates that the individual actors acted willfully and deliberately acted outside their assigned statutory duties and obligations under the facts of the**

case.

The Appellees' responses to this legal claim have been to advance that the Petitioner/Appellant has cited absolutely no federal law in its favor on this issue. The Appellees have advanced Saucier v. Katz__, 533 U.S._____ (2001). Petitioner respectfully advances that the Saucier decision supports the Petitioner's position versus that as advanced by the Appellees. For instance, at no time, prior to the initiation of the instant case before the United States District Court, did the Attorney General's Office of the State of Georgia ever render any determination concerning O.C.G.A. § 40-6-315(d), and that the language of that statute was totally discretionary. In other words, the reader of O.C.G.A. § 40-6-315(d), would clearly believe that there was a mandatory duty by the members of the Board of Public Safety to ". . . **publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**" And if the members of the Board of Public Safety did not publish, as required pursuant to O.C.G.A. § 40-6-315(d), then the individual members of the Board of Public Safety were acting outside their legal and lawful authority.

In the face of O.C.G.A. § 40-6-315(d), the Appellees have plainly and forthrightly stated, . . . we have not **"publish[ed] lists of all protective headgear and eye-protective devices by name and type"** as required by the instant statute, and we ". . . **are not going to do it!**" It is the Appellees' position that if the citizens of the State of Georgia cannot figure out the formulas we established concerning headgear and eye-protective gear, not withstanding the fact that they do not have access to these formulas in the first place, then the Appellees can financially pad the State and local financial coffers until the citizens of the State of Georgia do learn!

The legal issues are whether the lower courts' findings that the plain language of O.C.G.A. § 40-6-315(d), in the face of the mandatory legal term of "shall" to be discretionary, and likewise, the lower courts'

declaration that the individual Appellees are immune from the Petitioner/Appellant's claims based upon qualified immunity are legally valid. Petitioner respectfully asserts that the lower courts' decisions are not legally valid.

The legal perimeters upon which the lower courts were restricted to in consideration of the Appellees numerous motions to dismiss have been clearly declared in the Eleventh Circuit Court's decision rendered in Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174 (11th Cir. 1993). In Marshal the court advanced that the legal perimeters in considering a motion to dismiss requires the lower courts to take the **factual allegations of the Plaintiffs' Complaint ... as true for the purposes of a motion to dismiss**. Petitioners respectfully advances that the lower court placed the Appellees' motions to dismiss upon the legal level of motions for summary judgment versus the correct legal perimeters of consideration.

If, as claimed in the Petitioner's Second Amended Complaint, that O.C.G.A. § 40-6-315(d), mandated that the Board of Public Safety ". . .shall publish lists of all protective headgear ... approved by it" and the Board of Public Safety, via its individual board members, failed to follow and adhere to their mandatory duties to ". . . publish lists of all protective headgear ... approved by it", then the Petitioner respectfully advances that **they have acted outside their legal and lawful position of authority**.

It is Petitioner's position that the lower courts applied the wrong standard to render its judgment in the instant case. It is Petitioner's position that the lower court was required to accept the Appellant's factual allegations as true. In other words, that O.C.G.A. § 40-6-315(d), mandated that the Board of Public Safety ". . .**shall publish lists** of all protective headgear and eye-protective devices by name and type which have been approved by it" and the Board of Public Safety, via its individual board members, failed to follow and adhere to their mandatory duties to ". . . publish lists of all protective headgear ... approved by it" and **therefore they have acted outside their legal authority**.

The Appellees' advancement, as affirmed by the Appellate Court's decision, that the statutory term of "shall" in context to O.C.G.A. § 40-6-315(d), is discretionary and therefore they are entitled to the protections of qualified immunity is patently baseless.

The district court correctly advanced. And the Appellate Court affirmed, "[T]o establish a Section 1983 violation, Plaintiffs must show (1) conduct committed by a person acting under color of state law (2) that deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996)." (D-31., Page 13. and 14.).

However, it is Petitioner's position that the Appellate Court, affirming the District Court's determination, in the face of the absolutely clear language of O.C.G.A. § 40-6-315(d), that the term "shall" is discretionary and the individual Appellee members of the Board of Public Safety are entitled to qualified immunity is clearly erroneous.

The lower courts have, by their decisions, declared that any statutory obligations upon the officials of the State of Georgia, pursuant to the mandatory term "shall" is only discretionary obligation and function to be performed if and when the official decides that he or she may want to perform the mandatory functions of his or her office. It is Petitioner's position that, **if** the State of Georgia can advance to the lower courts that O.C.G.A. § 40-6-315(a) and (b) are mandatory upon the part of the citizens of the State of Georgia and yet O.C.G.A. § 40-6-315(d) is discretionary, **then,** the statute is vague across the board. If this is allowed, all the Georgia statutes, which contain the mandatory term of "shall", must be declared "discretionary." This logic is clearly erroneous, but it is logic adopted by the lower courts in this case.

Petitioner respectfully advances that the individual Appellee members of the Board of Public Safety, are not cloaked with qualified immunity and never have been under the facts of the case and that the lower courts erred in granting immunity.

Likewise, injunctive and equitable relief clearly does not require a waiver of the Eleventh Amendment rights of the Appellees by the Appellant. Injunctive and equitable relief is the inherent right of the federal forum against the individual states of the United States. In Re Employment Discrimination Litigation, 198 F.3d 1305 (11th Cir. 2000); Ex Parte Young, 209 U.S. 123, 159-60 (1908).

IV The Appellate Court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

In 1969, the Georgia Legislature passed O.C.G.A. § 40-6-315, and it was enacted into law by the signature of the Governor of the State of Georgia. O.C.G.A. § 40-6-315 is expressed in its entirety at page one and two of this petition. For the past thirty-two (32) years the State of Georgia has been enforcing O.C.G.A. § 40-6-315, by and through its various law enforcement agencies, both state and locally.

Thousands of citations have been issued against individuals who have operated motorcycles within the State of Georgia for allegedly violating O.C.G.A. § 40-6-315 by the various law enforcement agencies of the State of Georgia.

Likewise, for Thirty-two (32) years the Georgia Department of Public Safety has issued points against the driver's license. Each of the thousands of individuals who have been cited with violating O.C.G.A. § 40-6-315 in some cases, revoking the driving privileges of those citizens, because of the points assessed to a violation of O.C.G.A. § 40-6-315. This caused the citizens' driving privileges to be suspended and/or revoked because the points exceeded the total points as allowed by law to be accumulated at the time of the citations.

For the past thirty-two (32) years, The Board of Public Safety, through the individual members of the Board of Public Safety have and presently continue, to violate the rights of the citizens of Georgia, under the Constitution of the United States, and deliberately and willfully caused the evasion of O.C.G.A. § 40-6-315(d) by failing to comply with the mandatory

requirements of that part of the statute to "**publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**"

The plain language of the statute combined with the most basic and accepted principals of statutory construction, as set out more fully above, clearly indicate that the language of O.C.G.A. § 40-6-315 are indeed mandatory, for citizens AND state agencies and state actors.

Petitioner respectfully asserts that the lower courts have erred in determining that O.C.G.A. § 40-6-315 did not impose a mandatory duty and obligation upon the Appellees.

V. The Appellate Court erred when it held that the Appellees had complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

The Appellees failed to address another of the Appellant's enumerations of error before Court of Appeals. It is Petitioner's position that the Appellees' failure to address this legal issue constitutes an admission. That the lower courts failed to recognize this acquiescence was error. The issues in question here, as raised by the Petitioner/Appellant, was the lower court's determination that, "Pursuant to the authority granted by the statute, the Board of Public Safety has promulgated rules and regulations that establish standards for headgear and eye-protective devices." See Ga. Comp. R. & Regs.r. 570-12-.01 to -.10 (2000)(regulating eye-protective devices); id. At r. 570-13-.01 to -.10 (regulating motorcycle headgear). These regulations define technical standards that acceptable headgear and eye-protective devices must satisfy. The regulations also require that manufactures affix a permanent label show that the equipment complies with the applicable standard. See id. At r. 570-12-.10 (eye protective device); id. At r. 570-13-.05 (headgear). Helmets are held to the standard set by the United States

Department of Transportation. See id. At r. 570-13..01 (1) ("Future reference to standards as for specifications, statute [sic] or regulations will be the current version of the United States Department of Transportation, National Highway Traffic Safety, Federal Motor Vehicle Safety Standards; Motorcycle Helmets. This will permit automatic adjustment to future revisions or adjustments in the standards."). Compliance requirements for eye-protective devices is determined in accordance with those test methods described in Section 6.3.4.1.1, 6.3.4.1.2. and 6.3.4.1.3. of the American Standards Institute Standard Z87.1-1968, September 1968, "Eye and Face Protection" and explained in Section 10.1 of the National Bureau of Standards Circular 533, May 20, 1953, "Method for Determining the Resolving Power of Photographic Lenses. Id. At r. 570012-.05(e)." (D-31., Page 3 and 4.)."

As advanced in Appellant's Brief in the court below, Petitioner reasonably believed that none of the members of the Honorable Panel in the Court of Appeals had ever heard of the foregoing regulations. Petitioner now asserts the reasonable belief that the members of this Honorable Court are likewise unfamiliar with the foregoing regulations.

If the members of the judiciary have never heard of the same, then it is more than a fairly reasonable assumption that the individual citizens of the State of Georgia are not aware of the same regulations. Furthermore, the Georgia Department of Public Safety cannot direct a citizen to where he or she can obtain the same. **Under the circumstances, it is impossible for a citizen to determine if they are in compliance with the statute, yet citizens have the same statute enforced against them, via citations and fines for failing to comply with that very statute.**

> O.C.G.A. § 40-6-315(d) states that,
> "[T]he Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof.

The Board of Public Safety *shall* publish lists of all protective headgear and eye-protective devices by name and type, which have been approved by it."

O.C.G.A. § 40-6-315(d)(Emphasis Added).

It is Petitioner's logical interpretation of "to issue and enforce regulations establishing standards and specifications for the approval thereof" was legislated by the Georgia Legislature to provide the Board of Public Safety with authority "to issue and enforce regulations establishing standards and specifications for the approval thereof" to be used by the Board of Public Safety in performance of its **mandatory function** to " . . . publish list of all protective headgear and eye-protective devices by name and type which have been approved by it."

It is Petitioner's position, supported by the Appellee's acquiescence and failure to address, refute, or challenge Appellant's position, that the lower court erred in finding that, the mere adoption of corresponding federal manufacturing regulations was totally compliant with the mandatory language of the statute under challenge. These guidelines were established for manufacturers to "self-govern" themselves not for compliance by the general public, who in most cases are unaware of such a provision. It is also a logical conclusion that "to publish list of all protective headgear . . . approved by it" is not the equivalent of the mere adoption of corresponding federal manufacturing regulations. Adopting some other formulaic regulation is not a "list of all protective headgear and eye-protective devices by name and type which have been approved."

VI The Appellate Court erred when it failed to grant Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

Again, in the Appellate Court, the Appellees chose not to address the Appellant's contention that the lower court erred in denying the Appellant's Motion for Temporary Restraining Order. Again, by the Appellees' acquiescence and failure to address this legal issue, as raised by the Appellant, constitutes an admission that the lower court erred. Petitioner/Appellant sought a discretionary appeal of the lower court's denial

of the Appellant's TRO/PI, and the Court of Appeals declined to grant the same, which was error.

Petitioner respectfully advances that the lower court failed to take into due consideration that Appellant's claims against the Appellees seeking temporary restraining order or in the alternative a preliminary injunction (hereinafter referred to as "TRO/PI").

Petitioner sought a TRO/PI to stop the Appellees from further illegal acts and actions in relationship to O.C.G.A. § 40-6-315, until the Appellees complied with the mandatory provisions of O.C.G.A. § 40-6-315(d).

The Eleventh Circuit has taken the position that an entry of a preliminary injunction is appropriate when the moving party demonstrates: (A) substantial likelihood of success on the merits; (B) that irreparable injury will be suffered unless the injunction issues; (C) that the threaten injury to the movant outweighs whatever damage the injunction may cause the opposing party; and (D) that granting the injunction will not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); Church v. City of Huntsville, 20 F.3d 1332, 1343 (11th Cir. 1994); Tally-Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989).

It is Petitioner's position that the lower court abused its discretion in denying Appellant's motion for a TRO/PI, it was further error for the Appellate Court to affirm that decision. For all intent and purposes the lower courts ruled that the citizens of the State of Georgia who ride motorcycles must attempt to locate regulations from unknown persons and parties and thereinafter attempt to see if the equipment meets the specifications of the regulations advanced by the Appellees as applicable. In light of the fact that the Appellees do not provide access to the citizens of the State of Georgia to the regulations in question, the logical question which must be answered is ***how*** is a citizen to make a determination that the equipment to be purchased meets the regulations as approved by the Georgia Board of Public Safety?

VII **The Appellate Court erred when it granted the**

Appellees' Motions to Dismiss.

Again, the Appellees, chose not to respond to this issue at the Appellate level. Petitioner again contends that the Appellees' failure to address this specific legal issue constitutes that the Appellees have conceded this legal issue.

Notwithstanding the fact that the Appellees chose not to address this issue, it is the Appellant's position, as earlier stated, the Appellate Court's review of a District Court's grant of a motion to dismiss under Rule 12(b)(6) is de novo. McKusick v. City of Mulbourne, Fla, 96 F.3d 478 (11th Cir. 1996); Barnett v. Bailey, 956 F.2d 1036, 1039 (11th Cir. 1992). The factual allegations of the Plaintiffs' Complaint are accepted as true for the purposes of a motion to dismiss. Marshall County Board of Education v. Marshall County Gas District, 992 F.2d 1171, 1174 (11th Cir. 1993).

The district court never accepted the factual allegations of the complaint and the Appellate Court, in turn affirmed that analysis. The District Court, as affirmed by the Court of Appeals, did not accept the plain language of O.C.G.A. § 40-6-315(d), but read into the instant statute what the Appellees asserted. In other words, that the only thing that the Appellees had to do was nothing, unless they wanted to do something under the guise that the legal term "shall" in O.C.G.A. § 40-6-315(d), was merely discretionary and was only an illusionary requirement upon the part of the Board of Public Safety requiring that the Board of Public Safety "... **shall publish lists of all protective headgear ... approved by it.**"

The District Court, as affirmed by the Appellate Court has **created and established**, in behalf of the State of Georgia and the Appellees that the legal term "shall" when placed in mandatory statutory language is only discretionary. Petitioner respectfully advances that the lower court did not read, interpret, or logically apply the standing case law to the lower court's legal determination of O.C.G.A. § 40-6-315(d). Petitioner respectfully advances that the lower courts: (1) ignored the clearly statutory language of O.C.G.A. § 40-6-315(d); (2) created a discretionary application of the statute in the face of the clear mandatory language of the statute; (3) that the lower court ignored the Appellant's state law claims against the State

agencies when invoked pursuant to Appellant's ante litem notices served upon the same.

Instead of addressing the factual basis of the statute under attack, the Appellees, as sanctioned by the District Court and affirmed by the Appellate Court, launched their attack upon the legal grounds that the State of Georgia has a lawful and legal right to have a statute which requires its citizens to wear helmets while riding on motorcycles. Picou v. Gillum, 874 F2d 1519 (11th Cir. 1989) and that the State of Georgia has no statutory obligations whatsoever but is only moderated by its discretion. The Appellate Court, in error, accepted this argument as authoritative.

Petitioner has never asserted that the State of Georgia lacks a lawful or legal right to pass a statute requiring citizens to wear motorcycle helmets. Rather, Petitioner is and has been challenging the present statute on the books of the State of Georgia as being unconstitutionally vague as defined and being enforced. Kolender v. Larson, 461 U.S. 352 (1983); Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); United States v. Davis, 36 F.3d 1424 (9th Cir. 1994), cert. denied, 115 S.Ct. 1147 (1995); United States v. Martinez, 49 F.3d 1398 (9th Cir. 1995), cert. denied, 116 S.Ct.749 (1996). See Also United States Doremus, 888 F.2d 630 (9th Cir. 1989). The Appellate Court, in affirming the District Court failed to analyze this case based on the issues presented by this Petitioner and held in favor of the Appellants in a manner contrary to law and contrary to the well plead facts and law, asserted below.

VIII **The Appellate Court erred when it denied the Appellant's Petition for Reconsideration.**

For all of the above stated reasons, the Court of Appeals should have granted Appellant's Petition for Reconsideration.

CONCLUSION

Appellant respectfully moves for this Honorable Court to grant review by Certiorari and reverse the Appellate Court on all of the foregoing legal issues.

Respectfully submitted,

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Supreme Court, U.S.
FILED

011599 FEB - 7 2002

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ABATE OF GEORGIA, INC.
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners
v.
STATE OF GEORGIA AND
GEORGIA DEPARTMENT OF PUBLIC SAFETY ET AL

On Petition For Writ of Certiorari
To The United States Court of Appeals For the Eleventh Circuit

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APPENDIX

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APPENDIX CONTENTS

Eleventh Circuit Court of Appeals, Order Denying Appellant's Petition for Rehearing, Filed November 9, 2001. Opinion by ANDERSON, Chief Judge, DUBINA and GODBOLD, Circuit Judges.(2)

Eleventh Circuit Court of Appeals, Order Denying Appellant's Motion for Temporary Restraining Order or Preliminary Injunction.(5)

Eleventh Circuit Court of Appeals, Order Denying Appellant's Petition for Permission to Appeal an Interlocutory Order Pursuant to 28 USC 1292(b).(9)

United States District Court for the Northern District of Georgia, Atlanta Division, Order Granting permission to Plaintiff to file its Second Amended Complaint.(11)

Eleventh Circuit Court of Appeals, Appellant's Reply Brief to Appellee's Motion to Dismiss.(13)

Eleventh Circuit Court of Appeals, Opinion Affirming the District Court's Dismissal of the case.(46)

Eleventh Circuit Court of Appeals, Appellant's Petition for Reconsideration.(51)

Eleventh Circuit Court of Appeals, Record Excerpts from the District Court:(59)

- District Court Docket Sheet(59)
- Plaintiff's Complaint(69)
- Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.(92)
- Plaintiff's Second Amended Complaint.(106)
- Order by the District Court Denying Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.(139)
- Order by the District Court Granting Defendant's Motion to Dismiss.(143)
- Notice of Appeal(162)

1. Eleventh Circuit Court of Appeals, Order Denying Appellant's Petition for Rehearing, Filed November 9, 2001. Opinion by ANDERSON, Chief Judge, DUBINA and GODBOLD, Circuit Judges.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 09 2001
THOMAS K KAHN
CLERK

No. 01-12215-CC

ABATE OF GEORGIA, INC.,
and all others similarly situated,

Plaintiff-Appellant,

versus

STATE OF GEORGIA,
GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Defendant -Appellees.

On Appeal from the United States Distrtct Court for the
Northern District of Georgia

BEFORE: ANDERSON, Chief Judge, DUEINA, and
GODBOLD, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

S/_____
UNITED STATES CIRCUIT JUDGE

ORD-41

2. Eleventh Circuit Court of Appeals, Order Denying Appellant's Motion for temporary Restraining Order or Preliminary Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U.S.D.C. Atlanta
AUG 25 2000
LUTHER D THOMAS, Clerk
By: S Sewell, Deputy Clerk

ABATE OF GEORGIA, INC., and all others similarly situated,

Plaintiffs,

CIVIL ACTION FILE

v.

NO.: 1:00-CV-1682-TWT

STATE OF GEORGIA and GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Defendants.

ORDER

This case is before the Court on Plaintiffs' Motion fora Temporary Restraining Order or Preliminary Injunction [Doe. 3]. The Court has considered the motion, Defendant's response, Plaintiffs' reply, and the testimony, exhibits and argument presented at a hearing on August 7, 2000. The Court finds that Plaintiff has failed to carry its burden of persuasion to authorize the extraordinary remedy of a preliminary injunction or a temporary restraining order.

First, Plaintiff has not shown a sufficient likelihood of success on the merits. Even assuming for the sake of discussion that the Georgia Department of Public Safety and the Georgia Court of Appeals are improperly interpreting Georgia law, that

does not authorize the federal court to provide a remedy. In order to involve this Court, the Plaintiff must show that the State is violating the federally protected rights of its members. A claim of statutory vagueness creates a cause of action only when it may chill or inhibit a constitutional right. There is no constitutional right to ride a motorcycle with a baseball cap.

Plaintiffs due process and equal protection claims are also unlikely to prevail because the Plaintiffs members have an adequate remedy at law in state court. The Plaintiffs evidence shows the availability of a state remedy in that in two orders submitted by Plaintiff, the Court dismissed citations against individuals charged with violating the law.

Second, Plaintiff has not shown irreparable injury. This statute has been in effect for ten years and Plaintiff has not shown that there would be irreparable injury from the failure of this Court to provide extraordinary relief now, especially in light of the evidence that the members have an adequate remedy at law in state court.

Third, in a balancing of the equities, the State has an interest in enforcing the helmet law which outweighs a rider's interest in knowing for certain if a helmet meets the State's requirements.

The Court, therefore, DENIES Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction [Doc. 3].

Additionally, Defendant's Motion to Dismiss the Complaint [Doc.5]is DENIED in light of the Amended Complaint filed by Plaintiffs.

SO ORDERED, this 23RD day of August, 2000.

S/
THOMAS W. THRASH, JR.
United States District Judge

Prepared by:

PATRICIA DOWNING 228350
Senior Assistant Attorney General
Department of Law
40 Capitol Square
Atlanta, GA 30334-1300

[Modified by the Court.]

3. Eleventh Circuit Court of Appeals, Order Denying Appellant's Petition for Permission to Appeal an Interlocutory Order Pursuant to 28 USC 1292(b).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.: 00-90032-C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT. 19, 2000
THOMAS K KAHN
CLERK

ABATE OF GEORGIA, INC.
and all Others similarly situated,

Petitioner,

versus

STATE OF GEORGIA,
GEORGIA DEPARTMENT OF
PUBLIC SAFETY,

Respondents.

On Petition for Permission to Appeal and Interlocutory Order
Pursuant to 28 U.S.C. 1292 (b)

Before: ANDERSON, Chief Judge, DUBINA and WILSON,

Circuit Judges.

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. 1292(b) is DENIED.

4. United States District Court for the Northern District of Georgia, Atlanta Division, Order Granting permission to Plaintiff to file its Second Amended Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U.S.D.C. Atlanta
OCT 24 2000
LUTHER D THOMAS, Clerk
By: S Sewell, Deputy Clerk

ABATE OF GEORGIA, INC.,
and all others similarly situated,

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 1:00-CV-1682-TWT

STATE OF GEORGIA and
GEORGIA DEPARTMENT OF
PUBLIC SAFETY,

Defendants.

ORDER

This is an action challenging the legality of Georgia's motorcycle helmet law. It is before the Court on the Defendants' Motion to Strike the Plaintiffs' Second Amended Complaint [Doc. 12]. Pursuant to Rule 15 of the Federal Rules of Civil Procedure, Plaintiffs are granted permission to file the Second Amended Complaint. The Defendants' Motion to Strike the Plaintiffs' Second Amended Complaint [Doc. 12] is DENIED as moot.

SO ORDERED, this 23RD, day of October, 2000.

S/THOMAS W. THRASH, JR.
United States District Judge

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5. Eleventh Circuit Court of Appeals, Appellant's Reply Brief to Appellee's Motion to Dismiss.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 01-12215-C

ABATE OF GEORGIA, INC. and
all others similarly situated,

Appellant,

U.S. COURT OF APPEALS
RECEIVED CLERK

JUL 23 2001
ATLANTA, GA

VS.

STATE OF GEORGIA, and
GEORGIA DEPARTMENT OF PUBLIC SAFETY, et al.,

Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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Table of Contents

Page

Table of Contents i

Certificate of Type Size and Style ii

Table of Cases and Citations iii

Summary of the Argument 1

Argument and Citation of Authority 3

I. **The lower court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.** 3

II. **The lower court erred by finding that the Georgia Department of Public Safety was immune from suit pursuant to the Eleventh Amendment, not withstanding the fact that the Appellant had filed ante litem notices and Appellant's claims upon the federal level were state law claims for damages against the agency as allowed under law.** 10

III. **The lower court erred by finding that the individual defendants are immune from suit based upon the defense of qualified immunity.** 14

IV. The lower court erred by finding that the Appellees have complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications. 18

V. Whether the Lower Court Erred by Failing to Appellant's Requests for Injunctive and Equitable Relief Against the Appellees. 21

VI. The lower court erred by granting the Appellees' motion to dismiss. 23

Conclusion 25

Certificate of Service 27

Certificate of Type Size and Style

Appellant respectfully advances that Appellant has used the 14 point Times New Roman for Appellant's Reply Brief.

Table of Cases and Citiations

Citation	Page
Adler v. Duval County School Bd., 206 F.3d 1070 (11th Cir. 2000)	7
AT&T Wireless PCS v. City of Atlanta, _____ F.3d _____ (11th Cir. 2000)	6
Barnett v. Bailey, 956 F.2d 1036 (11th Cir. 1992)	8, 23
Bennett v. Wood, 188 Ga. App. 630 (1988)	8, 9
Blessing v. Freestone, 520 U.S. 329 (1997)	6
Church v. City of Hunstville, 20F.3d 1332 (11th Cir. 1996)	22
Dowis v. The State, 243 Ga. App. 354 (2000)	6, 9, 12
Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996)	16
Durley v. Apac, _____ F.3d _____ (11th Cir. 2000)	12
Eagleview Technologies v. MDS Associates, _____ F.3d _____ (11th Cir. 1999)	12
Ex Parte Young, 209 U.S. 123 (1908)	18

Gilbert v. Richardson, 264 Ga. 744 (1994)

8, 9

Griffith v. United States (In re Griffith),
206 F.3d 1389, (11th Cir. 2000) 6, 7

Harris v. Garner,
190 F.3d 1279, 1284 (11th Cir. 1999) 7

Holmes v. Chatham Area Transit,
234 Ga. App. 42, 44 (1998) 8, 9

In Re Employment Discrimination Litigation,
198 F.3d 1305 (11th Cir. 2000) 18

McKusick v. City of Mulbourne, Fla.,
96 F.3d 478 (11th Cir. 1996) 23

Kolender v. Larson, 461 U.S. 352 (1983) 24

Marshall County Board of Education v. Marshall County Gas District,
992 F.2d 1171, 1174 (11th Cir. 1993) 15, 23

McDonald's Corp. v. Robertson,
147 F.3d 1405 (11th Cir. 1998) 21

Moritz v. Orkin Exterm. Co.,
215 Ga. App. 255 (1994) 8, 9

Peterson v. BMI Refractories,

132 F.3d 1405 (11th Cir. 1998) 12

Picou v. Gillum, 874 F.2d 1519 (11th Cir. 1989) 24

Port Auth. Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 11

Salinas v. United States, 522 U.S. 52, 57-58 (1997) 8

Saucier v. Katz, 533 U.S. _____ (2001)

1
3

Spain v. Brown & Williamson Tobacco,
___ F.3d _____ (11th Cir. 2000) 12

Tally-Ho, Inc. v. Coast Community College Dist.,
889 F.2d 1018 (11th Cir. 1989) 22

United States v. Davis,
36 F.3d 1424 (9th Cir. 1994),
Cert. Denied, 115 S.Ct. 1147 25

United States v. Doremus,
888 F.2d 630 (9th cir. 1989) 25

United States v. Martinez,
49 F.3d 1398 (9th Cir. 1995),
cert. denied, 115 S. Ct. 1147 (1996) 25

United States. Parratt v. Taylor,
451 U.S. 527 (1981) 16

United States v. Ron Pair Enters.,
489 U.S. 235 (1989) 7

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 24

Title 42 U.S.C., Section 1983 . . . . . Throughout Brief

Statutory Citations - State of Georgia

O.C.G.A., Section 40-6-315 . . . . . Throughout Brief

O.C.G.A., Section 40-6-315(a) . . . . . Throughout Brief

O.C.G.A., Section 40-6-315(b). . . . . Throughout Brief

O.C.G.A., Section 40-6-315(c). . . . . Throughout Brief

O.C.G.A., Section 40-6-315(d). . . . . Throughout Brief

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ABATE OF GEORGIA, INC., and
all others similarly situated,

Plaintiff,

vs.

CIVIL ACTION
NO. 01-12215-C

STATE OF GEORGIA, and
GOERGIA DEPARTMENT OF
PUBLIC SAFETY, et al.,

Defendants.

REPLY BRIEF OF THE APPELLANT

Summary of the Argument[1]

For thirty-one (31) years the State of Georgia, The Appellees and via the various law enforcement departments have been illegally enforcing O.C.G.A. § 40-6-315, against persons operating motorcycles in the State of Georgia. While the State of Georgia mandated statutory compliance upon the part of its citizens under the term "shall" pursuant to O.C.G.A. § 40-6-315(a) and (b)., the State of Georgia has illegally taken the same mandatory language of "shall" upon the part of the State of

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[1] In light of the fact that the Appellee's brief does not address the legal issues raised in Appellant's brief, Appellant has included the Summary of the Argument so that the Court does not have to fish between the briefs filed so as to make a comparative legal analysis in these proceedings.

Georgia, via the Board of Public Safety, to be discretionary and/or not requiring them to act as mandated pursuant to O.C.G.A. § 40-6-315(d). It is Appellant's position that the lower court committed six (6) errors when it granted the Appellees' motion to dismiss. Appellant advances the following specific grounds, to wit:

I. **The lower court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.**

II. **The lower court erred by finding that the Georgia Department of Public Safety was immune from suit pursuant to the Eleventh Amendment, not withstanding the fact that the Appellant had filed ante litem notices and Appellant's claims upon the federal level were state law claims for damages against the agency as allowed under law.**

III. **The lower court erred by finding that the individual defendants are immune from suit based upon the defense of qualified immunity.**

IV. **The lower court erred by finding that the Appellees have complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.**

V. **Whether the Lower Court Erred by**

Failing to Appellant's Requests for Injunctive and Equitable Relief Against the Appellees.

VI. The lower court erred by granting the Appellee's motion to dismiss.

Argument and Citation of Authority

I. The lower court erred in determining that O.C.G.A. § 40-6-315(d), did not impose a mandatory duty and obligation upon the Appellees.

The Appellees have wilfully chosen and refused to address Appellant's claim of error upon the part of the lower court as to the above-claimed legal error.

While the Appellees have fully quoted the statute in question, the Appellees have refused to concede or address, whatsoever, the mandatory language of **§ 40-6-315(d)**. Instead, the Appellees still blindly advance the discretionary part of **§ 40-6-315(d)**, and continue to wilfully ignore the mandatory provisions of the statute in question and claim that the discretionary part of **§ 40-6-315(d)** is the only thing required.

When the Georgia Legislature passed the instant statute and it was enacted into law with the signing of the same by the then Governor of the State of Georgia. The purpose of the instant statute was to rovide the citizens of the State of Georgia with the knowledge and ability to determine whether a citizen's legal activities, relating to the operation of a motorcycle, was in compliance with the instant statute. Logically the Georgia Legislature, provided the Georgia Department of Public Safety with the discretion to determine the appropriate headgear and

eye-protective gear which would meet the statutory requirements and demanded, pursuant to the term "shall" that "[T]he Board of Public Safety ***shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***." While the Appellees have formulated the testing and construction basis for headgear and eye-protective devices,[2] they have in fact under current laws, required that the citizens of the State of Georgia, without access to such, make a self determination whether their equipment meets the statutory requirements[3] without complying with the mandatory part of the instant statute.

The absolutely clear statutory purpose of **§ 40-6-315(d)**, was for the Georgia Department of Public Safety, to have the discretion to determine minimum standards for headgear and eye-protective devices and to determine the products for sale to the general public, within the State of Georgia, that have met those standards and thereafter publish a list of the same so that the citizens of Georgia could readily and easily determine the prospective headgear and eye-protective devices which were approved for use within the State of Georgia.

Instead of complying with the plain meaning and language of **§ 40-6-315(d)**, the Appellees have wilfully and deliberately avoided, evaded and abrogated the statutory language, in pertinent part of, **§ 40-6-315(d)** and illogically contend that the

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2 The Appellees have not provided the citizens of Georgia access to the mathematical formulas or where a citizen can obtain the same as those who answer the telephones at the Georgia Department of Public Safety have absolutely no idea when someone calls in about the standards.

3 During the TRO/PI hearing before the lower court, the Appellees could not refute Appellant's position that a watermelon or cantaloupe met the standards as counsel for the Appellees simply did not have the ability or capability to refute that fact.

Appellees conduct pursuant to the statute is constitutionally valid and therefore not open to any legal challenge by Appellant.

O.C.G.A. § **40-6-315(a) and (b),** demands that the citizens "shall" comply with the requirements of each of the statutory mandates set for in each statutory provision.

The Appellees have demanded and continue to demand and enforced its will upon the citizens of the State of Georgia via the inherent language of the statute. However, the State of Georgia, Department of Public Safety, via the Board of Public Safety, have wilfully and deliberately refused and to abide by its mandated obligations as imposed by the plain language of O.C.G.A. § 40-6-315(d). Instead the Appellees, via the State's highest legal authority, the Attorney General's Office, has taken the position that mandatory language of the statut in question is only discretionary versus the plain language of the statute which imposes mandatory obligations upon the State of Georgia relating to the totality of the statute.

The lower court, inrendering judgment for the Appellees, admitted that "[I}t is undisputed that the Board of Public Safety has not published list of all protective headgear and eye-protective devices by name and by type which have been approved by it/" (D-31., Page 4.) The lower court admitted, as it had to, that the Appellees had not complied with the mandatory provisions of O.C.G.A. § 40-6-315(d).

The best legal shot that the Appellees have advanced, both before the lower court and this Honorable Court, is that "...a cloth bandana as a head-covering" does not meet the statutory obligations. In support of this legal concept, the Appellees have advanced the decision by **Dowi: V. State**, 243 Ga. App. 354 (2000).

Abrogation versus Precatory

The Honorable Court in **AT&T Wireless PCS v. City of Atlanta**, ____ F.3d ____ (11th Cir. 2000), in looking at the construction of a statute that compels a governmental agency to act has states that **"the statute must unambiguously impose a binding obligation" on the governmental body in question. Blessing v. Freestone**, 520 U.S. 329, 341 (1997).

The clear and unambiguous language of O.C.G.A. § 40-6-315(d), clearly mandates under the legal term "shall" that the "[T]he Board of Public Safety ***shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.***"

The Eleventh Circuit in **Griffith v. United States (In re Griffith)**, 206 F.3d 1389, (11th Cir. 2000) (en banc), has further stated that the **"Interpretation of a statute begins 'with the language of the statute itself.' As a general rule, if the language of the statute is plain, then out interpretive function ceases and we should `enforce [the statute] according to its terms.'" United States v. Ron Pair Enters.**, 489 U.S. 235, 241, 109 S.cT. 1026, 103 L.Ed.2d 290 (1989).

The logical purpose for which the Georgia Legislature passed O.C.G.A. § 40-6-315(d), when it was enacted into law, was so that the very situation that now exists, would not arise and has now existed for thirty-one years, that a person who operates a motorcycle within the legal perimeters pursuant to O.C.G.A. § 40-6-315(a) & (b) would know, pursuant to ***a published list of all protective headgear and eye-protective devices***, which headgear or eye protective device it was lawful to wear while

operating a motorcycle.

Appellant respectfully advances that the lower court's determination that amendments to O.C.G.A. § 40-6-315, by the Georgia General Assembly substituting the newly created Commissioner of Motor Vehicle Safety as the applicable regulatory authority in place of the Board of Public Safety, ***effective July 1, 2001,*** has absolutely nothing relevant to whether or not the Appellees have violated the law. (D-31-Page 3.). Some future act which may change who violates or does not violate the law is not relevant to the acts and actions which have occurred to date. See **Adler v. Duval County School Bd.**, 206 F.3d 1070 (11th Cir. 2000): **Harris v. Garner**, 190 F.3d 1279, 1284 (11th Cir. 1999) (Absent mistake or absurdity, we implement the statutory language as enacted); **Salinas v. United States**, 522 U.S. 52, 57-58 (1997).

Likewise, the Georgia judicial system has likewise adhered to the same legal line of statutory construction and interpretation as recognized by the federal judiciary. The Georgia Supreme Court in **Holmes v. Chatham Area Transit**, 234 Ga. App. 42, 44 (1998), found that **"[I]t is axiomatic that if an enactment is plain and unambiguous, we must give its words their plain and ordinary meaning, except for words which are terms of art or have a particular meaning in a specific context. We must seek 'to give meaning to each part of the statute and to avoid constructions which render a portion of the statute mere surplusage.'"** **Moritz v. Orkin Exterm. Co.**, 215 Ga. App. 255, 256-257 (450 S.E.2d 233) (1994). **"[A] statute must be construed together, and harmonized wherever possible, so as to ascertain the legislative intendment and give effect thereto.'"** **Bennett v. Wood**, 188 Ga. App. 630, 632 (1)(373 S.E.2d 645) (1988).

Finally, **"[i]t is a basic rule of construction that a statute or constitutional provision should be construed to make all its parts harmonize and to give a sensible and intelligent effect to each part, as it is not presumed that the legislature intended that any part would be without meaning."** (Punctuation omitted.) **Gilbert v. Richardson**, 264 Ga. 744, 747-748 (3) (452S.E.2d 476)(1994)."

While the Appellees have, en masse, sought the protection of the decisions by the Georgia Court of Appeals in **Dowis v.** State, 243 Ga. App. 354 (2000), Appellant respectfully advances that the **Dowsi** decision is inherently defective and clearly goes against **Gilbert v. Richardson**, 264 Ga. 744 (1994), as well as those decisions by the Georgia Court of Appeals in **Holmes v. Chatham Area Transit**, 234 Ga. App. 42 (1998); **Moritz v. Orkin Exterm. Co.**, 215 Ga. App. 255 (1994); **Bennett v. Wood**, 188 Ga. App. 630 (1988).

Appellant respectfully advances that the decision rendered in **Dowis** Court absolutely goes against the statutory language of the statute in question and that decision is clearly absolutely and grossley erroneous in the face of the absolutely plain language and purpose of the statute. If **Dowis** is lawful, than it is lawful for the citizens of the State of Georgia to declare that O.C.G.A. § 40-6-315(a) and (b), are likewise discretionary upon the part of the citizens to which it may be applicable. Appellant respectfully advances that the Georgia Court of Appeals in **Dowis**, ***promotes disrespect for the law***, for the State of Georgia is clearly advancing the legal theory that the citizens are to do what the State of Georgia says, but the State of Georgia is not required to follow the same laws by which they demand absolute compliance by its citizens.

II The lower court erred by finding that the Georgia Department of Public Safety was immune from suit pursuant to the Eleventh Amendment, not withstanding the fact that the Appellant had filed ante litem notices and Appellant's claims upon the federal level were state law claims for damages against the agency as allowed under law.

The Appellees have placed their response to th Appellant's second legal issue as their fourth responsive position.[4]

In response to the Appellant's second legal challenge to the judgment of the lower court, the Appellees have not challenged, nor refuted, that the Appellant filed ante litem notices, and pursuant to Georgia's ante litem statutes, that the State of Georgia waives their Eleventh Amendment rights. Likewise, the Appellees have not challenged Appellant's position, as advanced in Appellant's brief that, such ante litem nitces, waived the Appellees' Eleventh Amendment rights so that a state law claim can be raised and prosecuted. Appellees have instead merely recited that the Eleventh Amendment of the United States Constitution, protects against suits against state officials in their official capacity and nothing else whatsoever. Likewise, the Appellee have not argued in their brief that Georgia's ante litem statutes waives their Eleventh Amendment rights, they have instrad chosen to ignore the Appellant's claims in toto and hope that this Honorable Court chooses not to address the issue in its

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[4]Of the Appellant's six (6) claimed errors upon the part of the lower court, the Appellees ignored the Appellant's first claim of error and have taken the balance of the Appellant's legal issues and mixed them up so as to force the Honorable Court to weed through their brief to determine their responses to each of the Appellant's claims of error.

decision.

Appellant attacks the lower court's determination that the Appellees are protected pursuant to the Eleventh Amendment of the United States Constitution. Appellant respectfully advance that the lower court erred in determining that the Eleventh Amendment foreclosed Appellant's claims against the named agency Appellees. Appellant's Second Amended Complaint, pursuant to Section III., clearly states the grounds upon which the Appellant was advancing jurisdiction before the lower court, to wit:

> Plaintiff asserts statutory jurisdiction pursuant to Title 28, United States Code § 1331. Additional jurisdiction is anchored pursuant to Title 42, United States Code § 1983, and First, Fifth, Fourteenth Amendments of the United States Constitution. ***Plaintiff has tendered such ante litem notices which waives immunity to said agency pursuant to Georgia Tort Claims Act as with O.C.G.A. § 51-12-26, and jurisdiction pursuant to O.C.G.A. § 51-12-5.1(b)***(Emphasis Added)(D-10., Page 4. and 5.).

Appellant conceded that federal claims, totally pursuant to Title 42, U.S.C. § 1983, do not pierce the immunity issues pursuant to the Eleventh Amendment of the United States Constitution, against the state agencies named in the Appellant's Second Amended Complaint. **Port Auth. Trans-Hudson Corp. v. Feeney**, 495 U.S. 299 (1990).

However, Appellant respectfully assers that the Appellant clearly and distinctly raised state law claims against the Appellee Agencies in the Appellant's Second Amended Complaint. Likewise, Appellant stated the stautory provisions under which

the Appellant was pursuing Appellant's state law claims. (D-10, Page 4. and 5.). It is Appellant's position that lower court could have and should have recognized the Appellant's state law claims and erred by not doing so.

The federal courts, as well as the Eleventh Circuit have repeatedly recognized the right of litigants to raise state law claims in addition to federal claims in suits filed in the federal forum **Peterson v. BMI Refractories** 132 F.3d 1405 (11th Cir. 1998); **Eagleview Technolofies v. MDS Associates**, ____ F.3d ____ (11th Cir. 1999); **Spain v. Brown & Williamson Tobacco**, ____ F.3d ____ (11th Cir. 2000); **Durley v. Apac**, ____ F.3d ____ (11th Cir. 2000).

In the fave of the Appellant's clear assertionof state law claims, the lower court ingnored the Appelant's legal claims against the Appellee agencies, under state law, as advanced pursuant to Appellant's invoking of such legal rights pursuant to Georgia's ante litem notices as codified pursuant to O.C.G.A. § 50-21-26 AND O.C.G.A. § 51-12-5.1(b). Instead the lower court has erroneously advanced, pursuant to Appellant's 1983 claims, that the Eleventh Amendment forecloses Appellant's claims against the instant state agencies.

Appellant respectfully advances that the Appellant's claims against the Appellee agencies, by the receipt of the Appellant's ante litem notices, clearly waived the Appellee agencies' Eleventh Amendment rights against the Appellant's claims against them. Appellant respectfully advances that the lower court erroneously mixed up and legally dumped the Appellant's state law claims into the Appellant's federal law claims raised pursuant to Title 42, U.S.C. § 1983.

Appellant respectfully advances, based upon the

Appellees' failure to address the Appellant's legal claims relating to the ante litem issues, that the Appellees have legally conceded that the Appellant's claims have merit and that the lower court erred.

III. The lower court erred by finding that the individual defendants are immune from suit based upon the defense of qualified immunity.

The Appellees' response to this legal claim is to advance that the Appellant "has cited absolutely no federal law in its favor on this issue."[5] The Appellees have advanced **Saucier v. Katz**, 533 U.S. _____ (2001). Appellant respectfuly advances that the **Saucier** decision supports the Appellant's position versus that as advanced by the Appellees. For instance, at no time, prior to the initiation of the instant case before the United States District Court, did the Attorney General's Office of the State of Georgia ever render any determination concerning O.C.G.A. § 40-6-315(d), and that the language of that statute was totally discretionary. In other words, the reader of O.C.G.A. § 40-6-315(d), would clearly believer that there was a mandatory duty by the members of the Boardof Public Safety to "..***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***." And if the members of the Board of Public Safey did not publish, as required pursuant to O.C.G.A. § 40-6-315(d), then the individual members of the Board of Public Safety were acting outside their legal and lawful authority.

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5 Appellees' brief at Page 18.

In the face of O.C.G.A. § 40-6-315(d), the Appellees have plainly and forthrightly stated,...we have not "***publish*[ed] *lists of all protective headgear and eye-protective devices by name and type***" as required by the instant statute, and .... ***we are not going to do it!*** It is the Appellees' position that if the citizens of the State of Georgia cannot figure out the formulas we established concerning headgear and eye-protective gear, not withstanding the fact that they do not have access tot he same, then they can financially pad the State and local financial coffers until they do learn!

The legal issues are whether te lower court's finding that the plain language of O.C.G.A. § 40-6-315(d), in the face of the mandatory legal term of "shall" to be discretionary, and likewise, the lower court's declaration that the individual Appellees are immune from the Appellant's claims based upon qualified immunity are legally valid.

The legal perimeters upon which th lower court was restricted to in consideration of the Appellees numerous motions to dismiss have been clearly declared in the Court's decision rendered in **Marshall County Board of Education v. Marshall County Gas District**, 992 F.2d 1171, 1174 (11th Cir. 1993). Im **Marshall** thi Court has advances that the legal perimerts in considering a motion to dismiss requires the lower courts to take the ***factual allegations of the Plaintiffs' Complaint...as true*** for the purposes of a motion to dismiss. Appellant respectfully advances that the lowre court placed the Appellees' motions to dismiss upon the legal level of motions for summary judgment versus the correct legal perimeters of consideration.

If, as claimed in the Appellant's Second Amended Complaint, that O.C.G.A. § 40-6-315(d), mandated that the

Board of Public Safety "...***shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***" and the Board of Public Safety, via its individual board members, failed to follow and adhere to their mandatory duties to "... ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***" then the Appellant respectfully advances that ***they have acted outside their legal and lawfuirl position of authority.***

It is Appellant's position that the district court applied the wrong standard to render its judgment in the instate case. It is Appellant's position that the lower court was required to accept the Appellant's factual allegations as true. In other words, that O.C.G.A. § 40-6-315(d), mandated that the Board of Public Safety "..."...***shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***" and the Board of Public Safety, via its individual board members, failed to follow and adhere tot heir mandatory duties to "... ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***" and ***therefore they have acted outside their legal authority.***

The Appellees' advancement that the statutory term of "shall" in context to O.C.G.A. § 40-6-315(d), ***is discretionary*** and therefor they are entitled tot he protections of qualified immunity is patently baseless.

The lower court correctly advanced "[T]o establish a Section 1983 violation Plaintiffs must show (1) conduct committe by a person acting under color of state law (2) that deprived them of rights, privileges or immunities secured by the Constitution or laws of the **United States. Parratt v. Taylor**, 451 U.S. 527,

535 (1981); **Duke v. Massey**, 87 F.3d 1226, 1231 (11th Cir. 1996)." (D-31., Page 13. and 14.).

It is Appellant's position that the lower court's determination, in the face of the absolutely clearly language of O.C.G.A. § 40-6-315(d), that the term "shall" is discretionary and the individual Appellee members of the Board of Public Safety are entitled to qualified immunity is clearly erroneous.

The lower court has, by its decision, declared that any statutory obligations upon the official sof hte State of Georgia, pursuant to the mandatory term "shall" is only discretionary obligation and function to tbe performed if and when the official decided that he or she may want to perform the mandatory functions of his or her office. It is Appellant's prosition that if the State of Georgia can advance to the lower court that O.C.G.A. § 40-6-315(a) and (b) are amandatory upon the part of the citizens of the State of Georgia and yet O.C.G.A § 40-6-315(d) is discretionary, that the statute is ***vague across the board***. If this is allowed, all the Georgia statutes which contain the mandatory term of "shall" must be declared "discretionary."

Appellant respectfully advances that the individual Appellee members of the Board of Public Safety, are not cloaked with qualified immunity and never have been under the facts of the case and that the lower court erred in grant the same to them.

Likewise, injunctive and equitable relief clearly does not require a waiver of the Eleventh Amendment rights of the Appellees by the Appellant. Injunctive and equitable relief is the inherent right of the federal forum against the individual states of the United States. **In Re Employment Discrimination Litigation**, 198 F.3d 1305 (11th Cir. 2000); **Ex Parte Young**, 209 U.S. 123, 159-60 (1908).

IV. The lower court erred by finding that the Appellees have complied with the statutory requirements of the law by the adoption of certain regulations concerning manufacture specifications.

Once again, the Appellees, like their failure to address the Appellant's first enumeration of error, have failed to address the Appellant's Fourth enumeration of error totaly in their brief. It is Appellant's position that the Appellees' failure to address this legal issue constitutes an admission that lower court erred in context to the same. The issues in question, as raised by the Appellant, was the lower court's determination that:

> Pursuant to the authority granted by the statute, the Board of public Safety has promulgated rules and regulations that establish standards for headgear and eye-protective devices. See Ga. Comp. R. & Regs.r: 570-12-.01 to -.10 (2000)(regulating motorcycle headgear). These regulations define technical standards that acceptable headgear and eye-protective devices must satisfy. The regulations also require that manufactures afix a permanent label show that the equipment complies with the applicable standard. See id. At r. 570-12-.10 (eye protective device); id. At r. 570-13-.05 (headgear). Helmets are held to the standard set by the United States Department of Transporationat. See id. At r. 570-13..01 (1) ("Future reference to standards as for specifications, statute [sic] or regulations will be the current versions of the United States Department of Transportation, National Highway Traffic Safety, Federal Motor Vehicle Safety

> Standards; Motorcycle Helmets. This will permit automatic adjustment to future revisions of adjustments in the standards.") Compliance requirements for eye-protective devices is determined in accordance witht hose test methods described in Section 6.3.4.1.1, 6.3.4.1.2 and 6.3.4.1.3. Of the American Standards Institute Standard Z87.1-1968, September 1968, "Eye and Face Protection" and explained in Section 10.1 of the National Bureau of Standards Circular 533, May 20, 1953, "Method for Determining the Resolving Power of Photographic Lenses.ID.At r. 570012-.05(e)." (D-31., Page 3 and 4.).[6]

As advanced in Appellant's Brief, Appellant would reasonably believe that non of the members of the Honorable Panel has ever heard of the foregoing regulations.[7] If the members of the this Honorable Panel, have never heard of the same, then it is more than a fairly reasonable assumption that the indivdual citizens of the State of Georgia are not aware of the same regulations or even the remotest possibility of how to obtain access tot he same. Nor can the Georgia Department of Public Safety direct a citizen to where he or she can obtain the same.

O.C.G.A § 40-6-315(d) States that "[T]he Board of

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6 Once again, it must be noted that the Georgia Board of Public Safety do not provide its citizens with access to the instant regulations nor even make the same known to anyone.

7 Under the Georgia Constitution, it is presumed that every citizen knows the laws of the State of Georgia and therefore knowledge of the instant statutory provisions is not discretionary upon the part of the citizens of the State of Georgia.

Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and ***to issue and enforce regulations establishing standards and specifications for the approval thereof***. The Board of Public Safety **shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.** (O.C.G.A. § 40-6-315(d))(Emphasis Added).

It is Appellant logical interpretation of ***"to issue and enforce regulations establishing standards and specifications for the approval thereof"*** was legislated by the Georgia Legislature to provide the Board of Public Safety with authority '***to issue and enforce regulations establishing standards and specifications for the approval thereof***' to be used by the Board of Public Safety in performance of its mandatory fuction to "...**publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**"

It is Appellant's position, supported by the Appellee's failure to address, refute, nor challenge Appellant's position, that the lower court erred in finding that the mere adoption of corresponding federal manufacturing regulations was totally compliant witht he mandatory language of the statute under challenge. These guidelines were established for manufacturers to "self-govern" themselves not for compliance by the general public, who in most cases are unaware of such a provision.

V. Whether the Lower Court Erred by Failing to Grant the Appellant's Request for Temporary Restraining Order.

Upon the Fifth ground of error, for the third time, the Appellees have chosed not to address the Appellant's contention that the lower court erred ind eying the Appellant's Motion for Temporary Restraining Order. Again, by the Appellees' failure to address this legal issue, as raised by the Appellant, constitutes an admission that the lower court erred.[8]

Appellant respectfully advances is that the lower court failed to take into due consideration that Appellant's claims against the Appellees seeking temporary restraining order or in the alternative a preliminary injunction (hereinafter referred to as "TRO/PI").

Appellant sought a TRO/PI tos top the Appellees with further legal acts and actions in relationship to O.C.G.A. § 40-6-315, until the Appellees complied with the mandatory provisions of O.C.G.A. § 40-6-315(d).

The Eleventh Circuit has taken the position that an entry of preliminary injunction is appropriate when the moving party demonstrates:

a. A substantial likelihood of success on the merits;
b. That irreparable injury will be suffered unless the injunction issues;
c. That the threaten injury to the movant outweighs whatever damage the injunction may cause the opposing party; and
d. That granting the injunction will not be adverse to the public interest.

---

[8] Appellant sought a discretionary appeal of the lower court's denial of the lower court's denial of the Appellant's TRO/PI, and the Court of Appeals declined to grant same.

McDonald's Corp. v. Robertson, 147 F.3D 1301, 1306 (11th Cir. 1998); **Church v. City of Huntsville**, 20F.3d 1332, 1343 (11th Cir. 1994); **Tally-ho, Inc. v. Coast Community College Dist**. 889 F.2d 1018, 1022 (11th Cir. 1989).

It is Appellant's position that the lower court abused its discretion in denying Appellant's motion for a TRO/PI, which the Appellees have not. For all intents and purposes the lower court ruled that the citizens of the State of Georgia who ride motorcycles must attempt to locate regulations from unknown persons and parties and thereinafter attempt to see if the equipment meets the specifications of the regulations advanced by the Appellees as applicable. In light of the fact that the Appellees do not provide access to the citizens of the State of Georgia to the regulations in question, the logical question which must be answered if ***how*** is a citizen to make a determination that the equipment to be purchased meets the regulations as approved by the Georgia Board of Public Safety?

VI. The lower court erred by granting the Appellees' motion to dismiss.

The Appellees, once again, pursuant to the Appellant' Sixth claimed error by the lower court, chosen not to respond to the same. Appellant, again contends that the Appellees' failure to address this specific legal issue constitutes that the Appellees have conceded this legal issue.

Notwithstanding the fact that the Appellees have chosed not to address this issue, it is the Appellant' position, as earlier stated, the Court's review of a district court's grant of a motion to dismiss under Rule 12(b)(6) is de novo. **McKusick v. City of Mulbourne, Fla.**, 96 F.3d 478 (11th Cir. 1996); **Barnett**

v. Bailey, 956 F.2d 1036, 1039 (11th Cir. 1992). The factual allegations of the Plaintiffs' Complaint are accepted as true for the purposes of a motion to dismiss. **Marshall County Board of Education v. Marshall County Gas District**, 992 F.2d 1171, 1174 (11th Cir. 1993).

The lower court never accepted the factual allegations of the Appellant's Complaint, as advanced in any of the Appellant's complaints, including the Appellant's Second Amended Complaint. The lower court did not accept the plain language of O.C.G.A. § 40-6-315(d), but read into the instant statute what the Appellees wanted it to, i.e., that the only thing that the Appellees had to do was nothing unless they wanted to do something under the illusionary guise that the legal term "shall" as contained on O.C.G.A. § 40-6-315(d), was merely discretionary and was only an illusionary requirement upon the part of the Board of Public Safety requiring the Board of Public "...***shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it***." The lower court has ***created and established***, in behalf of the State of Georgia and the Appellees that the legal term "shall" when placed in mandatory statutory language is only discretionary. Appellant respectfully advances that the lower court did not read, interpret, or logically apply the standing case law to the lower court's legal determination of O.C.G.A. § 40-6-315(d). Appellant respectfully advances that the lower court: (1) ignored the clearly statutory language of O.C.G.A § 40-6-315(d); (2) created a discretionary application of the statute in the face of the clear mandatory language of the statute; (3) that the lower court ignored the Appellant's state law claims against the State agencies when invoked pursuant to Appellant's ante litem notices served upon the same. Instead of addressing the factual basis of the statute under attack, the Appellees, as sanctioned by the lower court, launched their attack upon the

legal grounds that the State of Georgia has a lawful and legal right to have a statute which requires its citizens to wear helmets whil ridign motorcycles. **Picou v. Gilum**, 874 F2d 1519 (11th Cir. 1989) and the state of Georgia has no statutory obligations whatsoever but only by discretion. Appellant ***has never challenged that the State of Georgia does not have a lawful or legal right to pass a statute requiring citizens to wear motorcycle helmets***, but ***challenged the present statute on the books of the State of Georgia as being unconstitutionally vague as defined and being enforced***. **Kolender v. Larson**, 461 U.S. 352 (1983); **Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.**, 455 U.S. 489 (1982); **United States v. Martinez**, 49 F.3d 1398 (9th Cir. 1995), cert. denied, 116 S.Ct.749(199). See Also **United States Doremus**, 888 F.2d 630 (9th Cir. 1989).

Conclusion

Appellant respectfully moves for thie Honorable Court to reverse the lower court on all of the foregoing legal issues.

This 23rd Day of July, 2001.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/John A. Roberts, Esquire
Georgia State Bar No.: 608705
Attorney for Appellant

THE ROBERTS LAW FIRM, P.C.

One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, Georgia 30326
(404) 841-0661

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true and accurate copy of the foregoing Reply Brief of Appellant upon the following parties by placing a copy of the same into an envelope with sufficient postage to ensure delivery addressed to:

Beverly Patricia Downing
Senior Assistant Attorney General
Office of the State Attorney General
40 Capital Square, S.W.
Atlanta, Georgia 30334-1300

This 23rd day of July, 2001.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/John A. Roberts, Esquire
Georgia State Bar No.: 608705
Attorney for Appellant

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Atlanta, Georgia 30326
(404) 841-0661

6. Eleventh Circuit Court of Appeals, Opinion Affirming the District Court's Dismissal of the case.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
Sept. 13, 2001
THOMAS K. KAHN
CLERK

No. 01-12215
Non-Argument Calendar

D. C. Docket No. OO-01682-CV-TWT-1

ABATE OF GEORGIA, INC.,
and all others similarly situated,

Plaintiff-Appellant,

versus

STATE OF GEORGIA,
GEORGIA DEPARTMENT OF PUBLIC SAFETY,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(September 13, 2001)

Before ANDERSON, Chief Judge, DUBINA, and GODBOLD, Circuit Judges.

PER CURJAM:

Plaintiff-Appellant American Bikers Active Toward Education ("ABATE") of Georgia, Inc., filed this action against Roy E. Barnes, in his official capacity as Governor of Georgia, Commissioner Robert E. Hightower of the Georgia Department of Public Safety in his official and individual capacities, the Georgia Board of Public Safety ("Board"), and the members of the Board in their official and individual capacities. Plaintiff brings this action under 42 U.S.C. § 1983 and challenges the constitutionality of Georgia's motorcycle helmet law tat requires all persons to wear "protective headgear" while operating or riding a motorcycle. GA. CODE ANN. § 40-6-315 (Supp. 1999). The district court granted Defendants' motion to dismiss. Plaintiff now appeals. We affirm.

We review de novo a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure I 2(b)(6) for failure to state a claim upon which relief can be granted. See McKusick v. City of Melbourne, Fla., 96 F.3d 478, 482 (llth Cir. 1996).

The statute at issue states in its relevant part:

> (a) No person shall operate or ride upon a motorcycle unless he or she is wearing protective headgear which complies with standards established by the Board of Public Safety.
>
> (b) No person shall operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he or she is wearing an eye-protective device of a type approved by the Board of Public Safety.

(c) This Code section shall not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to a person operating a three-wheeled motorcycle used only for agricultural purposes.

(d) The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.

§ 40-6-3 15.

The statute was amended in the 2000 session of the Georgia General Assembly to substitute the newly created Commissioner of Motor Vehicle Safety as the applicable regulatory authority for the Board of Public Safety, effective July 1, 2001. See id.

Plaintiff first contends that the Board's failure to publish lists of approved headgear and eye-protective devices violates Plaintiffs rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. Second, Plaintiff contends that the statute is unconstitutionally vague. Plaintiff alleges that the failure of the Board to publish a list of approved gear prevented ABATE's members from knowing what equipment satisfies the statutory requirements.

The district court did not err in granting Defendants' motions to dismiss for failure to state a claim upon which relief can be granted. The statute authorizes the promulgation of rules and regulations enacting standards. O.G.C.A. § 40-6-3 15.

Standards have been promulgated and they require manufactures to affix a permanent label to headgear and eye-protective devices showing compliance with the applicable standards. See GA. COMP. R. & REGS. r. 570-12-.01 et. seq. (1999); See id. at r. 570-13-.01et. seq. Plaintiff asserts that the statute requires the Board to issue lists approving specific types of headgear, which Dowis rejected. See Dowis v. State, 243 Ga. App. 354, 355 (2000). The Georgia Court of Appeals interpreted the statute and stated that "[t]he statute does not require the Board to approve specific types of headgear." Dowis, 243 Ga. App. at 355. The district court did not err when it reasoned that it would be a gross intrusion for it to undercut this decision of the Georgia Court of Appeals, construing a Georgia statute.

Plaintiff raises a flurry of other issues. The statute is not unconstitutionally vague on its face. Operating a motorcycle is not speech within the First
Amendment. Plaintiff's due process violation claims have no merit. See Picou v.Gillum, 874 F.2d 1519, 1521 (11th Cir. 1989). There is no equal protection issue.

Plaintiff's claims for damages are barred by the Eleventh Amendment. See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104-106 (1984).

AFFIRMED.

7. Eleventh Circuit Court of Appeals, Appellant's Petition for Reconsideration.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ABATE OF GEORGIA, INC. and
all others similarly situated,

U.S. COURT OF APPEALS
RECEIVED CLERK

OCT 18 2001
ATLANTA, GA

Appellant,

vs. APPEAL CASE NO.: 01-12215

STATE OF GEORGIA,
GEORGIA DEPARTMENT OF
PUBLIC SAFETY,

Appellees.

PETITION FOR RECONSIDERATION

COMES NOW ABATE OF GEORGIA, INC., Appellant, by and through undersigned counsel, and pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Local Rule 40 and tenders Appellant's Petition for Reconsideration, by the Eleventh Circuit Court of Appeals and shows the Honorable Court as follows:

I. Dowis v. State

The Honorable panel adopted the decision rendered by the lower court as rendered by the Georgia Court of Appeals in **Dowis v. State**, 243 Ga. App. 354 (2000), advancing to void the same would undercut that decision rendered by the Georgia Court of Appeals.

It is Appellant's position that the federal judiciary has the legal and lawful right to set aside any decision by the State of Georgia which violates the legal and lawful rights of the citizens of the State of Georgia under the United States Constitution. **Dowis** upon its face goes against the clear stare decisis of numerous prior decisions by the Georgia judiciary concerning the application of the plain meaning and intent of statutes passed by the Georgia Legislature versus applying a judicial limned viewpoint of a statute which conflicts with the plain meaning and intent of a statute.

Appellant respectfully advances that the Honorable Court did not properly apply the de novo standards to the facts and issues as otherwise indicated pursuant to its opinion.

II. Eleventh Amendment Issues

Appellant respectfully advances that the Honorable Court did not properly apply and/or address Appellant's claims against the state agencies under the Appellant's state law claims, which were supported by Appellant's tendering the required ante litem notices to the individual agencies, which, under Georgia law, legally strips the an agency of immunity issues and defenses.

The Honorable Court, as well as the lower court, failed to take into consideration the Appellant's state law claims against the Appellee agencies, as waived by law, into due and proper consideration, as raised by the Appellant by the filing of the required ante litem notices to each agency involved.

Likewise, Appellant respectfully advances that the Honorable Court has not properly applied the Eleventh Amendment issues of immunity to the individual actors as named in Appellant's suit, as the clear evidence indicates that they wilfully and deliberately acted outside their assigned statutory

duties and obligations under the facts of the case.

Appellant respectfully advances that the panel has not applied the proper legal standards to the facts of the case and therefore has erred.

Appellant respectfully moves for the Honorable Court for a rehearing and rehearing en banc as to the issues raised in the instant appeal, prior to taking the this case to the United States Supreme Court for its review and consideration.

This 4th day of October, 2001.

Respectfully submitted,
THE ROBERTS LAW FIRM, P.C.

S/_____
John A. Roberts, Esquire
Georgia State Bar No.: 608705
Attorney for Appellant

Certificate Of Interested Persons and Corporate Disclosure Statement

Pursuant to Rule 26.1 of the 11th Circuit Court Rules of the Federal Rules of Appellate procedure, Plaintiffs state that the following persons or parties may have interest in the proceedings:

ABATE of Georgia, Inc.
c/c William McNair, Chief Executive Officer
13816 Woolsey Road
Hampton, Georgia 30228

John A. Roberts, Esquire
The Roberts Law Firm, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
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Thurbert B. Baker
Attorney General of the State of Georgia
40 Capital Square, S.W.
Atlanta, Georgia 30334-1300

Beverly Patricia Downing
Assistant Attorney General
40 Capital Square, S.W.
Atlanta, Georgia 30334-1300

Hon. Thomas W. Thrash, Jr.

United States District Court Judge
75 Spring Street, S.W.
Atlanta, Georgia 30303

Wayne Abernathy
Member of the Georgia Board of Public Safety

Roy E. Barnes
Governor of the State of Georgia

Jacqulyn H. Barrett
Member of the Georgia Board of Public Safety

Reoney L. Bowen, III
Member of the Georgia Board of Public Safety

Daniel M. Bryant
Member of the Georgia Board of Public Safety

Gregory T. Coursey
Member of the Georgia Board of Public Safety

Rebexxa Denlinger
Member of the Georgia Board of Public Safety

Donnie Haralson
Member of the Georgia Board of Public Safety

W.H. "Dub" Harper, Jr.

Member of the Georgia Board of Public Safety

Bruce Harris
Member of the Georgia Board of Public Safety

Robert E. Hightower
Member of the Georgia Board of Public Safety

Robert E. Keller
Member of the Georgia Board of Public Safety

Jamil Saba
Member of the Georgia Board of Public Safety

Lydia J. Saitain
Member of the Georgia Board of Public Safety

Jim Wetherington
Georgia Department of Public Safety

Unknown City, County and State Law Enforcement Agents State of Georgia

CERTIFICATE OF SERVICE

I hereby certify' that I have on this day sewed a true and accurate copy of the foregoing PETITION FOR RECONSIDERATION upon the following parties by placing a copy of the same into an envelope with sufficient postage to ensure delivery addressed to:

Beverly Patricia Downing
Senior Assistant Attorney General
Office of the State Attorney General
40 Capital Square, S.W.
Atlanta, Ga 30334-1300

This 4th day of October, 2001.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/_____
John A. Roberts, Esquire
Georgia State Bar No.: 608705
Attorney for Appellant

THE ROBERTS LAW FIRM, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, GA 30326
(404) 841-0661

8. Eleventh Circuit Court of Appeals, Record Excerpts from the District Court:

a. District Court Docket Sheet

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 0142215-C

ABATE OF GEORGIA, INC. and
all others similarly situated,

Appellant,

vs.

STATE OF GEORGIA, and GEORGIA DEPARTMENT OF PUBLIC SAFETY, et al.,

Appellees.

RECORD EXCERPTS

File Record Index

District Court Docket Sheet.....A

Plaintiffs Complaint.....B

Plaintiff s TRO/PI Motion.....C

Plaintiffs Second Amended Complaint.....D

Order by the District Court
Denying Plaintiffs TRO/PI.....E

Order by District Court Granting
Defendants Motions to Dismiss.....F

Notice of Appeal.....G

Proceedings include all events. CLOSED
1:09cv1682 Abate of GA, itnc. v.
State of GA, Public, et al

7/5/00 1		Class action COMPLAINT filed. Consent form to proceed before U.S. magistrate and pretiral instructions given to attorney; jury demand FILING FEE $ 150.00 receipt # 456767 (CRC) [Entry date 07/06/00] [Edit date 07/06/00]
7/5/00 2		ANSWERS TO MANDATORY DISCLOSURES by plaintiff (crc) [Entry date 07/06/00]
7/5/00 3		MOTION by plaintiff for temporary restraining order, and/or in the alternative for preliminary injunction with brief in support. (to TWT) (crc) [Entry date 07/06/00]
7/20/00	4	Response by defendants to [3-1] motion for temporary restraining order, and/or [3-2] motion for preliminary injunction (crc) [Entry date 07/21/00]
7/25/00	--	SUBMITTED to Judge Thomas W. Thrash on [3-1] motion for temporary restraining order, and [3-2] motion for preliminary injunction. (File in chambers.) (crc) [Entry date 07/25/00] [Edit date 07/25/00]
7/26/00	5	MOTION by defendants to dismiss with brief in support. (crc) [Entry date 07/27/00]
8/3/00 6		REPLY by plaintiff to response to [3-1] motion for temporary restraining order, [3-2] motion for preliminary injunction (crc) [Entry date 08/04/00]
8/4/00 7		AMENDED COMPLAINT by plaintiff adding Roy E. Barnes, Robert E. Hightower, Jim

		Wetherington, Unknown City, County; jury demand (crc) [Entry date 08/08/00]
8/7/00	8	Motion HEARING held before Judge Thomas W. Thrash [3-1] motion for temporary restraining order, [3-2] motion for preliminary injunction, [5-1] motion to dismiss. Court heard argument and admitted exhibits. Court DENIED all motions - dft's counsel to prepare order. Case to proceed on regular course. (fms) [Entry date 8/08/00]
8/7/00	--	Terminated submissions. (fms) [Entry date 08/08/00]
8/7/00	–	Exhibits by plaintiff from TRO hearing received from CRD and placed 1 folder exh in exh room (fms) [Entry date 08/08/00]
8/23/00	–	Steno notes of proceedings held 8/7/00 before Judge Thomas W. Thrash, by Court Reporter Linda W. Baggett. (Aaq) [Entry date 8/23/00]
8/25/00	9	ORDER by Judge Thomas W. Thrash DENYING [3-1] motion for temporary restraining order by Abate of GA, Inc., DENYING [3-2] motion for preliminary injunction by Abate of GA, Inc. DENYING [5-1] motion to dismiss by GA Public Safety, State of Georgia in light of the amended complaint filed by plas (cc) (crc) [Entry date 08/28/00]
9/20/00	10	AMENDED COMPLAINT, by plaintiff adding Jim Wetherington, Hubert L. Smith, Reoney L. Bowen III, Rebecca Denlinger, Daniel Bryant, Sheriff Jacqueline Barrett, Sheriff Bruce Harris, Robert E. Keller, Lydia Sartain, W.H. "Dub" Harper Jr., Wayne Abernathy, Sherrif Donnie Haralson, Sheriff Gregory T. Coursey, and Sheriff Jamil Saba; jury demand (crc) [Entry date 9/20/00]

9/25/00	11	ANSWER by defendant to first amended complaint [7-1] Discovery ends 2/22/01 (crc) [Entry date 09/28/00]
9/28/00	12	MOTION by defendant to strike plas' second [10-1] amended complaint with brief in support. (crc) [Entry date 10/02/00]
10/5/00	13	Notice to take deposition of Wayne Yancy and Jim Wetherington by plaintiff (crc) [Entry date 10/11/00]
10/6/00	14	WAIVER OF SERVICE Returned Executed as to Robert E. Hightower mailed 9/26/00 Answer due by 11/25/00 for Robert E. Hightower (crc) [Entry date 10/11/00]
10/6/00	15	WAIVER OF SERVICE Returned Executed as to Greogory T. Coursey mailed 9/29/03 Answer due by 11/28/00 for Gregory T. Coursey (crc) [Entry date 10/11/00]
10/6/00	16	WAIVER OF SERVICE Returned Executed as to Bruce Harris mailed 10/2/00 Answer due by 12/1/00 for Bruce Harris (crc) [Entry date 10/11/00]
10/11/00	17	Response by plaintiff and opposition to [12-1] motion strike plas' second [10-1] amended complaint (crc) [Entry date 10/12/001
10/12/00	–	SUBMITTED to Judge Thomas W. Thrash on [12-1] motion to stike plas' second [10-1] amended complaint (crc) [Entry date 10/12/00]
10/20/00	18	Certified copy of ORDER of USCA on

		petition to appeal pursuant to 28 USC 1292 (b) is DENIED. USCA dkt no. 00-90032 (crc) [Entry date 10/23/00]
10/24/00	19	ORDER by Judge Thomas W. Thrash DENYING as moot [12-1] motion to strike plas' second [10-1] amended complaint by defendants (cc) (crc) [Entry date 10/24/00]
10/24/00	–	Terminated submissions. (crc) [Entry date 10/24/00]
10/27/00	20	MOTION by defendants to stay discovery with brief in support. (crc) [Entry date 10/30/00]
10/27/00	21	MOTION be defendants to dismiss with brief in support. (crc) [Entry date 10/30/00]
11/9/00	22	Notice to counsel by Judge Thomas W. Thrash. The Judge's law clerk is a relative of a named party in this action. The Judge is not required to recuse. Ms. Barnes has not and will not be allowed to participate in any way in any decisions, discussion or proceedings in this matter. (cc) (crc) [Entry date 11/13/00]
11/13/00	23	Response by plaintiff in opposition to [21-1- motion to dismiss and [20-1] motion to stay discovery (crc) [Entry date 11/14/00]

11/14/00	–	SUBMITTED to Judge Thomas W. Thrash on [21-1] motion to dismiss (crc) [Entry date 11/14/00]
11/16/00	–	SUBMITTED to Judge Thomas W. Thrash on [20-1] motin to stay discovery. (File in chambers.) (Crc) [Entry date 11/16/00] [Edit date 11/16/00]
11/20/00	24	ORDER by Judge Thomas W. Thrash GRANTING [20-1] motion to stay discovery. Discovery is stayed until the court rules on the claims of qualified and Eleventh Amendment immunity (cc) (crc) [Entry date 11/20/00]
11/22/00	25	MOTION by defendants to dismiss pla's second amended complaint with brief in support. (crc) [Entry date 11/24/00]
11/30/00	26	REPLY by defendant to response to [25-1] motion to dismiss pla's second amended complaint (crc) [Entry date 12/01/00]
12/4 / 00	27	MOTION by plaintiff to extend time to respond to [25-1] motion to dismiss pla's second amended complaint thru 1/5/01 with proposed order. (to TWT) (crc) [Entry date 12/05/00] [Edit date 12/05/001
12/14/00	28	ORDER by Judge Thomas W. Thrash GRANTING [27-1] motion to extend time to respond to [25-1] motion to

		dismiss pla's second amended complaint thru 1/5/01, [25-1] motion to dismiss pla's second amended complaint to be submitted on 1/6/01 (cc) (crc) [Entry date 12/18/00]
12/19/00	29	Response by defendant to [27-1] motion to extend time to respond to [25-1] motion to dismiss pla's second amended complaint thru 1/5/01 (crc) [Entry date 12/29/00]
1/3/01	30	Response by plaintiff in opposition to [25-1] motion to dismiss pla's second amended complaint (crc) [Entry date 01/05/01]
1/5/01	–	SUBMITTED to Judge Thomas W. Thrash on [25-1] motion to dismiss pla's second amended complaint. (File in chambers.) (crc) [Entry date 01/05/01]
3/23/01	–	Terminated submissions. (crc) [Entry date 03/23/01]
4/4/01	31	ORDER by Judge Thomas W. Thrash DENYING [21-1] motion to dismiss by defendants GRANTING [25-1] motion to dismiss pla's second amended complaint (cc) (crc) [Entry date 04/04/01]
4/4/01	–	Terminated submissions. (crc) [Entry date 04/04/01]
4/4/01	32	JUDGMENT ENTERED for defendants against plaintiff (crc) [Entry date 04/04/01]
4/20/01	33	NOTICE OF APPEAL by plaintiff from [32-1] judgment, [31-1] order FILING FEE $105.00 RECEIPT # 470143 Appeal information sheet due 5/4/01 (kac) [Entry date 04/24/01]
4/20/01	34	Appeal information sheet RE: [33-1] appeal - COR due 4/30/01 (kac) [Entry date 04/24/01]

4/24/01	--	Notice of appeal, judgment, order and certified copy of docket to USCA RE: [33-1] appeal (kac) [Entry date 04/24/01]
4/26/01	35	Appeal information sheet RE: [33-1] appeal - COR due 5/6/01 (kac) [Entry date 05/01/01]
4/27/01	36	Acknowledgment by USCA RE: [33-1] appeal USCA dkt no. 01-12215-C (kac) [Entry date 05/01/01]
5/2/01	–	CERTIFICATE OF READINESS of appeal record with certified copy of docket mailed to USCA RE: [33-1] appeal USCA # 01-12215 (2 vol. pldgs, 1 vol exh) (jph) [Entry date 05/02/01]

Docket as of May 2, 2001 8:35 am

b. Plaintiff's Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABATE OF GEORGIA, INC. and
all others similarly situated,

Plaintiff,

vs.

STATE OF GEORGIA,
GEORGIA DEPARTMENT OF
PUBLIC SAFETY,

Defendants.

FILED IN CLERK'S OFFICE
U.S.D.C. ATLANTA
JUL-5 2000

LUTHER D. THOMAS, Clerk
By Deputy Clerk R
1 00-CV-1682

CIVIL ACTION

NO.: 1:00-CV-1682

COMPLAINT

COMES NOW ABATE OF GEORGIA, INC., Plaintiff, by and through undersigned counsel, and in behalf of the above—styled cause of action shows the Honorable Court as follows:

I.

Plaintiff is a Georgia corporation and by the filing of the above-styled Complaint is subject to the jurisdiction of the Honorable Court.

II.

Defendants, as named in the above-styled Complaint are:

A.

State of Georgia, who can be served by service of

process on the Thurbert E. Baker, Attorney General, 40 Capital Square, S.W., Atlanta, Georgia 30334 (hereinafter referred to as Defendant 'Georgia").

B.

Georgia Department of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371, who can be served by service of process on Colonel Robert E. Hightower, at the aforementioned address (hereinafter referred to as Defendant "GDPS").

III.

Jurisdiction and venue are properly before the Honorable Court. Plaintiff asserts statutory jurisdiction pursuant to Title 28, United States bode 5 1331. Additional jurisdiction is anchored pursuant to Title 42, United States Code § 1983, and First, Fifth, Fourteenth amendments of the United States Constitution.

IV.

Plaintiff advances that the Defendant, State of Georgia, by and through Defendant Georgia Department of Public Safety, by and through numerous city, county and state law enforcement agencies, have violated statutory and constitutional rights of the certain individual members of ABATE OF GEORGIA, INC., as well as other individuals who fall within the class of members which the above-styled Complaint covers or pertains to and Plaintiff states the following pertinent facts, in pertinent part, which have violated the rights of the same, to wit:

1. The Georgia Legislature enacted a certain statute which became a standing law in the State of Georgia, which is

enforced by the State, Cities and Counties of the State of Georgia, which is codified pursuant to O.C.G.A. § 406315, which said statute states:

40-6-315. Headgear and eye-protective devices for riders.

(a) No person shall operate or ride upon a motorcycle unless he is wearing protective headgear which complies with the standards established by the Board of Publis Safety.

(b) No person shall operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he is wearing an eye-protective device of a type approved by the Board of Public Safety.

(c) This Code section shall not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to a person operating a three-wheeled motorcycle used only for agricultural purposes.

(d) The Board of Public Safety is authorized to approve of disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. **The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.**

(Ga. L. 1969, p. 732, § 3; Code 1933, § 68A-1306,

enacted by Ga. L. 1974, p. 633, § 1; Ga. L. 1984, p. 1329, § 2; Ga. L. 1990, p. 2048, § 5.) (Emphasis Added) 40-6-316. Rules and regulations.

The Board of Public Safety is authorized to promulgate rules and regulations to carry this part into effect and to establish regulations for safety standards for the operation of motorcycles.

(Code 1933, § 68A-1306, enacted by Ga. L. 1974, p. 633, § 1; Ga. L. 1985, p. 149, § 40; Ga. L. 1990, p. 2048, § 5.)

2. Defendant Georgia and Defendant GDPS, together with those law enforcement acquire for the State of Georgia and the individual cities and counties of the State of Georgia have issued citations against the Plaintiff and others similarly situated for allegedly violating the aforementioned statute.

3. Defendant Georgia, by and through Defendant GDPS, have further sanctioned the respective members of the Plaintiff and others cited with alleged violations of the aforementioned statute, by placing points against an alleged violator's driving license which has resulted, in individual cases with suspension of driving privileges, and other sanctions.

4. Defendant Georgia, by and through Defendant GDPS, pursuant to the statutory mandates, as passed by the Georgia Legislature, and signed into law by the Governor of the State of Georgia. pursuant to O.C.G.A. § 40-6-315(d), required certain acts and actions to be performed by Defendant GPDS which the instant statute clearly states, to wit:

The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. ***The Board of Public Safety shall publish lists of all protective headgear and eye—protective devices by*** **name** ***and type which*** **have** ***been approved by it.***
(Emphasis Added).

5. Defendant GPDS, has wilfully failed and refused to comply with the aforementioned statutory mandates pursuant to O.C.G.A.§ 40-6-315(d), by the following acts and actions, to wit:

   a. Wilfully failing to publish a list of all protective head gear and eye-protective devices by name and type which have been approved by Defendant GPDS;

   b. Wilfully failing to publish a list of all protective head gear and eye-protective devices by name and type which have been approved by Defendant GPDS, so that members of the Plaintiff organization and all others similarly situated have knowledge of approved equipment as required by the statute in question.

6. Defendant Georgia, by and through Defendant GDPS, as well as other state, city and county law enforcement agencies, have enforced alleged violations of O.C.G.A. § 40-6-315, against
members of the Plaintiff organization and against other individuals similarly situated, knowing that said statute cannot be enforced based upon the wilful and deliberate failure of Defendant Georgia, by and through Defendant GDPS to comply with the statutory mandates pursuant to O.C.G.A. § 40-6-315(d).

7. Defendant Georgia and Defendant GDPS, knowing that they have wilfully failed and refused to comply with the statutory mandates of O.C.G.A. § 40-6-315(d), have, nevertheless, allowed, sanctioned and aided and abetted such illegal citations issued pursuant to said violation of said statute, by:

   a. Allowing state, city and county law enforcement agencies to issue citations against members of the Plaintiff's organization as well as other individually situated persons claiming that the same has violated O.C.G.A. § 40-6-315;

   b. Allowing state, city and county law enforcement agencies to thereinafter prosecute alleged violations of O.C.G.A. § 40-6-315, to find alleged violators of said statute to be guilty of violating said statute, knowing that there can be no violations of the said statute based upon the failure to the Defendants to comply with the statutory mandates of O.C.G.A. § 40-6-315(d).

   c. Allowing state, city and. county law enforcement agencies to thereinafter prosecute alleged violations of O.C.G.A. § 40-6-315, to illegally find said alleged violators guilty and impose and collect illegal fines against the same.

   d. Allowing state, city and county law enforcement agencies to illegally use said statute for the purposes of illegally collecting revenue for alleged violations of said statute.

8. Defendant Georgia and GDPS have allowed, sanctioned, aided and abetted, certain parts of the Georgia judiciary to aid the Defendants in enforcing the instant statute and the collection of said illegal revenue against members of the Plaintiff and other similarly situated individuals.

COUNT ONE
UNCONSTITUTIONAL STATUTE

Plaintiff realleges and incorporates Section IV., subsections 1., through 8., and states that the Defendants have enforced an unconstitutional statute by the following acts and actions, to wit:

A. Defendant Georgia and GDPS have wilfully failed to abide by the mandatory language of O.C.G.A. § 40—6—315(d), by wilfully failing and refusing to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

B. Defendant Georgia and GDPS have wilfully enforced the instant statute knowing that there exists no ***lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful.
violation of O.C.G.A. § 40-6-315(d).

C. Defendant Georgia and GDPS have allowed, sanctioned, aided and abetted state, city and county law enforcement agencies to enforce said statute, knowing that Defendant GDPS has failed to ***publish lists of all protective headgear and eye-protective devices by name*** **and** ***type which have been*** **approved** ***by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

D. Defendant Georgia and GDPS know that no citizen of the State of Georgia can comply with the said statute based upon the fact that Defendant GDPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of

O.C.G.A. § 4-6-315(d).

E. Defendant Georgia and GDPS has enforced the said statute knowing it is unconstitutional based upon the fact that Defendant GDPS has wilfully failed to ***publish lists of all protective headgear and eye-protective devices by name*** **and** ***type which have been approved*** by Defendant GDPS in wilful violation of O.C.G.A. § 40-6—315(d).

F. Defendant Georgia and GDPS, as well as state, city and county law enforcement agencies continue to enforce said statute knowing that it is unconstitutional based upon defendant GDPS's wilful failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in **wilful violation** of O.C.G.A. § 40-6-315(d).

G. Defendant Georgia and GDPS, as well as state, city and county law enforcement agencies continue to collect revenue from the continuing enforcement of the said statute knowing at all times that Defendant GDPS's failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation of O.C.G.A. § 40-6-315(d)**, makes the statute unconstitutional.

COUNT TWO
UNCONSTITUTIONALLY VAGUE

Plaintiff realleges and incorporates Section IV., subsections 1., through 8., Count One into Count Two and states that the statute under legal challenge is unconstitutionally vague and states the following acts and actions to wit:

A. Defendant Georgia and GDPS have wilfully failed to abide by the mandatory language of O.C.G.A. § 40-6-315(d), by wilfully failing and refusing to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

B. Defendant Georgia and GDPS have wilfully enforced the instant statute knowing that there exists no ***lists of all protective headgear*** and ***eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

C. Defendant Georgia and GDPS have allowed, sanctioned, aided and abetted state, city and county law enforcement agencies to enforce said statute, knowing that Defendant GDPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

D. Defendant Georgia and GDPS know that no citizen of the State of Georgia can comply with the said statute based upon the fact that Defendant GDPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

E. Defendant Georgia and GDPS has enforced the said

statute knowing it is unconstitutional based upon the fact that Defendant GDPS has wilfully failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation of O.C.G.A. § 40-6-315(d).**

F. Defendant Georgia and GDPS, as well as state, city and county law enforcement agencies continue to enforce said statute knowing that it is unconstitutional based upon Defendant GDPS's wilful failure to ***publish lists of all piotective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation** of O.C.G.A. § 40-6-315(d).

G. Defendant Georgia and GDPS, as well as state, city and county law enforcement agencies continue to collect revenue from the continuing enforcement of the said statute knowing at all times that Defendant GDPS's failure to ***publish lists of all protective headgear*** **and** ***eye-protective dev$ces by name and type which have been approved by*** Defendant GDPS **in wilful violation** of O.C.G.A. § 40-6-315(d), makes the statute unconstitutionally vague.

COUNT THREE
INJUNCTIVE RELIEF

Plaintiff requests the following injunctive relief against the Defendants, to wit:

A. That the Court suspend further legal enforcement of the statute in question until such time that Defendant GDPS complies with the statutory mandates to ***publish lists of all protective headgear and eye-protective devices by name*** **and** ***type which have been approved by***

Defendant GDPS.

B. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order invalidating all previous issued criminal citations issued and prosecuted by state, city and county law enforcement agencies and compel that said agencies immediately refund all fines, including applicable interest as allowed by law, to be paid by the agencies which received said funds.

C. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order invalidating any sanctions, penalties or other acts or actions taken against any person by Defendant GDPS against the individual's driving license, and if monetary sanctions were imposed to refund the same, including applicable interest as allowed by law, to be paid by Defendant GDPS, as collected by said Defendant to each individual.

D. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order that there shall be no further enforcement of said statute until Defendant Georgia, by and through Defendant GDPS, publish lists of all protective headgear and eye-protective devices by name and type which have been approved by Defendant GDPS, with the following limitations being utilized prior thereto:

a. That the State of Georgia, by and through Defendant GDPS, provide each licensed individual within the state of Georgia who is authorized to ride a motorcycle, to receive a list of all approved equipment and provide that a period of not less than ninety (90) days, shall have passed prior to enforcement so as to enable said individual to have sufficient time to obtain such approved equipment.

b. That the State of Georgia, by and through Defendant GDPS, or other appropriate state agencies, at the county level shall issue, with the annual registration of each such motorcycle or other such equipment which falls under said statute, shall receive a list of such approved equipment and provided a ninety (90) day period to obtain such authorized and/or approved equipment prior to further enforcement of said statute by state, city or county authority.

COUNT FOUR
DECLARATORY JUDGMENT

Plaintiff requests the Honorable Court grant Plaintiff Declaratory Judgment finding the following, to wit:

A. That the Court find that Defendant Georgia and Defendant GDPS wilfully failed to comply with the statutory mandates to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation** of O.C.G.A. § 40-6-315(d).

B. That the Court find that the Defendants have illegally enforced the instant statute under challenge, issues numerous criminal citations, the same being illegally prosecuted by state, city and county law enforcement agencies and same illegally collected finds pursuant to the illegal enforcement of said statute.

C. That the Court find that Defendant GDPS has imposed sanctions, penalties or other acts or actions against persons charged by Defendant GDPS against the individual's driving license, and illegally imposed monetary sanctions against individuals for alleged violations of said statute.

D. Find that Defendant Georgia and Defendant GDPS has sanctioned, aided and abetted numerous state, city and county law enforcement agencies to illegally charge individuals with violations of the statute under challenge.

E. Find that Defendant Georgia and Defendant GDPS has sanctioned, aided and abetted numerous state, city and county law enforcement agencies to illegally charge individuals with violations of the statute under challenge purely for financial gain and knowingly allowed such violation of those individual's civil rights by enforcement of the said statute under challenge.

COUNT FIVE
PUNITIVE DAMAGES

Plaintiff realleges and incorporates Section :v., subsections 1., through 8., Count One, Count Two into Count Five and advances that the Plaintiff and all individuals similarly situated are entitled to punitive damages against the Defendants, to wit:

A. That Defendant Georgia and Defendant GDPS, have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all those individual persons similarly situated by:

a. Illegally enforcing a statute when Defendant GDPS failed and continues to refuse to ***publish lists of all protective headgear and aye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

b. Illegally charging individuals under said statute when the Defendants knew that there could be not violation of the statute in question based

upon the wilful and deliberate failure of Defendant GDPS to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. § 40-6-315(d).

B. That Defendant Georgia and Defendant GDPS, have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all others individuals who have been charged, prosecuted and fined for violations of said unconstitutional statute.

C. That Defendant Georgia and Defendant GDPS, have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all others individuals who have been charged, prosecuted and fined for violations of said unconstitutional statute by further punishing Plaintiff's members and other individuals by sanctioning said individuals driver's licenses and in specific cases suspending licenses and charging said individuals to pay to have suspended driving licenses reinstated after allowed by the laws of Georgia concerning suspended driver's licenses.

D. That the Defendants, as well as other state, city and county legal authorities have wilfully violated the rights of the members of the Plaintiff's organization, as the rights of others similarly situated by the illegal enforcement of the statute in question, and. did so for purely financial gain and profit by said parties, knowing that they were at all times committing said violations under the exercise of the statute in question.

E. That the Defendants, as well as other state, city and county legal authorities, knowing of the failure of the said statute to meet the legislative requirements, as passed by the Georgia Legislature and signed into law by the

Governor of the State of Georgia, have, by the aforementioned acts and actions, wilfully acted outside of their legal authority by the prosecution of the members of the Plaintiff's organization, as well as other persons charged with violations of said statute.

COUNT SIX
VIOLATION OF TITLE 42 U.S.C. § 1983

Plaintiff realleges and incorporates Section IV., subsections 1., through 8.., Count One, Count Two, Count Five into Count Six and advances that the Defendants have violated the civil and constitutional rights of the Plaintiff's members and other individual similarly situated, by the following acts and actions, to wit:

A.. That Defendant Georgia, by and through the wilful and intentional conduct of Defendant GDPS, by and through the wilful and deliberate failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation** of O.C.G.A. § 40-6-315(d), has violated and continues to violate the rights of the Plaintiff's members and others similarly situated enforcing the statute under challenged as required and mandated by the Georgia Legislature when the same was passed and enacted into law.

B. That Defendant Georgia, by and through the wilful and intentional failure of Defendant DGPS by and through the wilful and deliberate failure to ***publish lists of*** **all** ***protective headgear and eye-protective devices by name*** **and** ***type which have been approved by*** Defendant GDPS **in wilful violation of** O.C.G.A. § 40-6-315(d), has invalidated the instant statute so that it could not be legally enforced pursuant to the wilful and deliberate failure to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant GDPS,

prior to any enforcement of the said statute by legal authorities at the state, city and county levels within the State of Georgia.

C. That Defendant Georgia, by and through the conduct of Defendant GDPS and all other state, city and county legal authorities have enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant GDPS to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant GDPS.

D. That Defendant Georgia, by and through the conduct of Defendant GDPS and. all other state, city and county legal authorities have enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant GDPS to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant GDPS, based upon the fact that a cantaloupe could be utilized and meet the requirements of the statute in question.

E. That Defendant Georgia, by and through the conduct of Defendant GDPS and all other state, city and county legal authorities have illegally enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant GDPS to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant GDPS, thereby violating the civil and constitutional rights of all individuals who have been prosecuted under said statute.

COUNT SEVEN
VIOLATION OF STATUTORY CONSTITUTIONAL RIGHTS

Plaintiff advances that the acts and actions of Defendant Georgia and Defendant GDPS, have violated Plaintiff's member's constitutional rights under and pursuant to the following United States Constitutional provisions, to wit:

1. Violation of the First Amendment of the United States Constitution

a. Defendant Georgia, by and through the various state, city and county law enforcement agencies have utilized the Georgia judicial system to prosecute Plaintiff's members and other individuals charged with violating O.C.G.A. § 40-6-315, when Defendant GDPS wilfully failed to ***publish lists off all protective headgear and eye-protective devices by name and type which have been approved by Defendant GDPS, in wilful violation of O.C.G.A. § 40-6-315(d)***.

b. By such failure by Defendant GDPS to to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant GDPS, in wilful violation of O.C.G.A. § 40-6-315 (d)**, caused Plaintiff's members and other individuals to be charged in the Georgia judicial system when there was no legitimate basis for any such charges to be raised and/or prosecuted.

c. By such charges being raised and prosecuted within the Georgia judicial system, Plaintiff's members and other individuals charged with violation of said statute were illegally prosecuted for violation a statute which was constitutionally vague and/or unconstitutional based upon the wilful and

deliberate failure of. Defendant GDPS to to ***publish lists off all protective headgear*** **and** ***eye-protective devices by name and type which have been approved*** **by Defendant GDPS, in violation of O.C.G.A. § 40-6-315(d).**

d. By such aforementioned conduct, Plaintiff's members and other individuals were constitutionally deprived for obtain fair and meaningful access to the Georgia judicial system which knowingly utilized the illegal prosecution pursuant to the instant statute against said individuals for pure financial gain of the state, city and county in which each such judicial occurrence took place wherein any such person was prosecuted for an alleged violation of said statute.

II. Violation of Fifth Amendment Rights

a. Plaintiff advances that the conduct, as heretofore stated in the aforementioned section dealing with the Defendants' conduct being in violation of the first
Amendment of the United States Constitution advances that the institution, prosecution and subsequent fines and othér penalties imposes against the Plaintiff's members and other individuals charged with alleged violations of the statute in question constitutes a violation of the fifth Amendment of the United States Constitution.

b. Plaintiff's members and other charges, prosecuted and sanctioned imposed has violated the Fifth Amendment rights of each such individual based upon the fact that each such persons due process right were violated by the

illegal charging, prosecition and penalties imposed when there could not exist any violation of said statute based upon Defendant GDPS wilful and deliberate failure to ***publish lists of all protective headgear and eye-protective devices by name and by type which have been approved by*** **Defendant GDPS, in violation of O.C.G.A. § 40-6-315(d)**.

c. Each such individual was and has been constitutionally deprived of their Fifth Amendment rights of due process against being charged with an offense which such statute does not constitute an offense due to the wilful and deliberate failure of Defendant GDPS to ***publish lists of all protective headgear and eye-protective devices by name and by type which have been approved by*** **Defendant GDPS, in violation of O.C.G.A. § 40-6-315(d)**, which each such person could know that their conduct violated the statute in question.

III. Violation of Fourteen Amendment Rights

a. Plaintiff's members and all other charged with a violation of the statute under challenge, have had their fourteenth Amendment rights violated by Defendant Georgia and Defendant GDPS, as well as other state, city and county law enforcement agencies and the Georgia judicial system by failing to accord each such person or party equal protection of the laws of the State of Georgia which are clearly defined and that a reasonable person could know versus the instant statute which cannot presently state an offense based upon Defendant GDPS wilful and deliberate failure to ***publish lists of all***

protective headgear and eye-protective devices by name and type which have been approved by **Defendant GDPS, in violation of O.C.G.A. § 40-6-315(d)**, by which each person which would be subject to said statute would clearly understand what protective headgear and eye-protective devices by name have been approved by the Georgia Department of Public Safety as legislatively mandated pursuant to O.C.G.A. **§ 40-6-315(d)**.

b. Said Defendants and others have wilfully violated the equal protection rights of said individuals tinder and pursuant to the Fourteenth Amendment of the United States Constitution by wilfully failing and refusing to have Defendant GDPS to ***publish lists at all*** **protective *headgear* and *eye-protective devices by name* and type *which have been approved by* Defendant GDPS, in violation of O.C.G.A. § 40-6-315(d)**, and such failure being violative of the Fourteen Amendment rights of each such person or party.

c. That the Defendants and others allowed, sanctioned and aided and abetted the denial of the rights guaranteed under the Fourteenth Amendment of the United States Constitution to the Plaintiff's members who have been charged, prosecuted and sanctioned for a violation of the statute under challenge, so that the said statute could be utilized for the sole and exclusive purposes of financial gain by said state, city and county law enforcement agencies and the judiciary entitles that have been utilized in the charges being placed and thereinafter prosecuted against said persons.

COUNT EIGHT
ANTE LITEM NOTICE

A. In an abundance of caution, the required statutory Ante Litem Notices have been sent to the Department of Administrative Services (see copy Exhibit "1" attached).

B. However, Plaintiffs allege and maintain under current case law that such "Notice" is not required.

C. Plaintiffs stat that under Patsy v. Board of Regents, 457 U.S. 496, 1982, exhaustion of state prerequisite to bringing a section 1983 action.

D. And further, under Ehlers v. City of Decatur, 614 F.2d 54 (5th Cir) 1980, the Court held that Georgia's ante litem notice requirements which consisted both of a time limitation of administrative remedies could not be applied to a section 1983 claim.

V.

Plaintiff demands a jury trial and the following relief:

A. Actual Damages, the amount which relates to Count 3., 4., and 5., as determined during discovery.

B. Special and Compensatory Damages in excess of One Million ($1,000,000) Dollars or such amount that the jury may determine that the Defendants should pay for the emotional harm and injury caused by the Defendants' acts and actions which resulted in the false arrest of the Plaintiff's
members and other individuals subjected to the aforementioned acts and actions of the Defendants.

C. Punitive Damages in Excess of Ten Million

($10,000,000) Dollars or such amount that the jury determines should be assessed against the Defendants for their wilful and deliberate conduct against the Plaintiff's members and other individuals subjected to the acts and actions of the Defendants and others which have been approved, sanctioned or aided and abetted by the Defendants.

D. That the Court grant Injunctive Relief as stated pursuant to Count Three of the Plaintiff's Complaint.

E. That the Court grant Declaratory Judgment as stated pursuant to Count Four of the Plaintiff's Complaint.

F. That the Court grant Plaintiff the cost of the prosecution of the above-styled cause of action, including, but not limited to attorney fees and other costs incurred based upon the violation of the Plaintiff's members civil and constitutional rights by the Defendants.

G. That the Honorable Court grant any other relief that the Court deems that the Plaintiff's members should be entitled to under law or equity may allow or that the Honorable Court deems appropriate.

This 4th day of July, 2000.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/_____

John A. Roberts
Attorney for the Plaintiff
Georgia State Bar No. 608705

c. Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. ATLANTA
JUL-5 2000

LUTHER D. THOMAS, Clerk
By Deputy Clerk J
1 00-CV-1682

ABATE OF GEORGIA, INC. and
all others similarly situated,

Plaintiff,

CIVIL ACTION NO.

vs.

1:00-CV-1682

STATE OF GEORGIA,
GEORGIA DEPARTMENT
OF PUBLIC SAFETY,

Defendants.

MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR IN THE ALTERNATIVE A PRELIMINARY INJUNCTION

COMES NOW ABATE OF GEORGIA, INC., Plaintiff, by and through undersigned counsel, and tenders Plaintiff's Motion for a Temporary Restraining Order and/or in the Alternative a Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and shows the Honorable Court as follows:

I. Pertinent Factual Background

Plaintiff has challenged the enforcement of O.C.G.A.. § **40-6-315**, based upon the fact that as the statute presently stands it is both unconstitutional and constitutionally vague.

The Georgia Legislature enacted the instant statute which has become a standing law in the State of Georgia. The instant statute, which is enforced by the State, Cities and Counties of the State of Georgia, is codified pursuant to O.C.G.A. § 40-6-315, which said statute states:

> 40-6-315. Headgear and eye-protective devices for riders.
>
> (a) ***No person shall operate or ride upon a motorcycle unless he is wearing protective headgear which complies with standards established by the Board of Public Safety.***
>
> (b) ***No person shall operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he is wearing an eye-protective device of a type approved by the Board of Public Safety.***
>
> (c) This Code section shall not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to a person operating a three-wheeled motorcycle used only for agricultural purposes.
>
> (d) ***The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Board of Public Safety shall publish - lists of all protective headgear and eye-protective devices by name and type which have been approved by it.***

(Ga. L. 1969, p. 732, § 3; Code 1933, § 68A-1306, enacted by Ga. L.1974, p. 633, § 1; Ga. L. 1984, p. 1329, § 2; Ga. L. 1990, p. 2048, § 5.) (Emphasis Added)

40-6-316. Rules and regulations.

The Board of Public Safety is authorized to promulgate rules and regulations to carry this part into effect and to establish regulations for safety standards for the operation of motorcycles.

(Code 1933, § 68A-1306, enacted by Ga. L. 1974, p. 633, § 1; Ga. L. 1965, p. 149, § 40; Ga. L. 1990, p. 2048, § 5.)

Plaintiff is a organization primarily consisting of individuals who ride motorcycles and the organization's members fall within the statutory perimeters of the instant statute when they operate their motorcycles within the State of Georgia;

When certain members of the Plaintiff organization have operated their motorcycles on the public streets and highways of the State of Georgia, they are being held legally subject to the instant statute in question.

Likewise, on numerous occasions, the Plaintiff's members have been, at various times issued citations by State, county and city law enforcement agencies in which said citations have accused said member of failing to comply within the statutory requirements of O.C.G.A., § 40-6-315. Said members have challenged the issuance of alleged violations of the aforementioned statute. The various courts routinely uphold the alleged violation of the instant statute and fines are routinely imposed, as well as additional punishment is sanctioned against an individual's drivers license which can have lateral consequences against an individual's right to operate a motorcycle and/or a motor vehicle within the State of Georgia.

Plaintiff advances that instant statute is being enforced by said state, county and city law enforcement agencies for the

purposes of purely revenue collection.[1]

II. The State's Failure to Comply with O.C.G.A. § 40-6-315(d)

When the Georgia Legislature passed and the instant statute and the same was enacted into law, there was a statutory requirement which was mandated by the Georgia Legislature for the Georgia Department of Public Safety to perform as a mandatory part of the instant statute to wit:

The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by and type which have been approved by [Georgia Department of Public Safety]. (O.C.G.A. § 40-6-315(d) (Emphasis Added).

The Georgia Department of Public Safety has wilfully and wantonly failed to comply with the mandatory requirements of O.C.G.A. § 40-6-315(d).

Instead, while allowing the aforementioned state, county and city law enforcement authorities to routinely issue citations for alleged violations of said statute, they thereinafter, further sanction each individual by: (1) placing points against an individual's driver's license; (2) if the instant citation causes more points against an individual's driver's license, causing the suspension of said individual's diver's license, and (3) if an individual drivers license is suspended based in part upon an alleged violation of the

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[1] ***Plaintiff advances that the allegations of the statute being enforced for the purpose of revenue collection is based upon the fact that the statute is unconstitutional and constitutionally vague which will addressed in greater detail further in Plaintiff's motion.***

instant statute, forces said individual to pay substantial sums to have the individual's driver's license reinstated.

All of the foregoing occurring when the Defendants know that the instant statute is presently unconstitutional and constitutionally vague as it presently stands. Under the limited information which the Defendants advance a cantaloupe meets the present state qualifications. Hence, Plaintiff advances that the present statute can best be defined as ***Georgia's Cantaloupe law.***

III. Plaintiff is entitled to a TRO/PI

Plaintiff has moved for the Honorable Court to hold a hearing and upon hearing the evidence and the facts of the case to issue a temporary restraining order and/or in the alternative a preliminary injunction to stop the State of Georgia, by and through such applicable state, county and city law enforcement officials from further enforcement of the instant statute during the pendency of the above-styled cause of action or until such time as the Defendants come into compliance with the constitutional requirements

In the Eleventh Circuit, entry of a preliminary injunction is appropriate when the moving party demonstrates:

a. a substantial likelihood of success on the merits;

b. That irreparable injury will be suffered unless the injunction issues;

c. that the threaten injury to the Movant outweighs whatever damage the injunction may cause the opposing party; and

d. that granting the injunction will not be adverse to the public interest.

See, e.g., **McDonald's Corp. v. Robertson**, 147 F.3d 1301, 1306 (11th Cir. 1998); **Church v. City of Huntsville**, 20 F.3d 1322, 1343 (11th Cir. 1994); **Tally-Ho, Inc. v. Coast Community College Dist.**, 889 F.2d 1018, 1022 (11th Cir. 1989).

Plaintiff respectfully advances that each of these requirements are met in this ease.

1. Plaintiff has a Substantial Likelihood of Succeeding

To support a preliminary injunction, a district court need not find that the evidence positively guarantees a final verdict in the Plaintiff's favor. **Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.**, 51 F.Sd 982, 985 (11th dir. 1995).

The State of Georgia and the Georgia Department of Public Safety have been enforcing a law which absolutely cannot be enforced due to the Defendants' own wilful and deliberate negligence. When a cantaloupe meets the present standards in the face of the statutory legislative directive requiring and legally mandating that the Georgia Department of Public Safety ***"...shall publish lists of all protective headgear and eye-protective devices by name and by type which have been approved by [Georgia Department of Public Safety]"*** leaves no further room for subjective discussion.

The clear legal implication upon just the bare legal facts conclusively anchors more than a reasonable assumption that the Plaintiff shall succeed on the merits.

2. Plaintiff's members will suffer Irreparable Harm in the Absence of a Preliminary Injunction

If the Honorable Court declines to grant a preliminary injunction, the Plaintiff's members will continue to be prosecuted under the instant statute when such prosecutions are patently unconstitutional. Likewise, each of the Plaintiff's members and others will also suffer fines based upon the unrefutable fact that

the courts of Georgia have repeatedly imposed the same on individuals who have been charged with allegedly violating the instant statute in question. Furthermore, Plaintiff's members and other individuals charged with violating the instant statute will continue to receive points against their respective driver's licenses which can cause possible suspensions and those associated costs with obtaining alternative transportation whiled suspended from driving in the State of Georgia, as well as the other states of the United States. There is also the consideration that the charges that the State of Georgia, by and through Defendant Georgia Department of Public Safety charges for re-instituting driver licenses from individual who have been suspended.

Plaintiff respectfully advances that the Plaintiff has more than sufficiently shown the irreparable harm in the absence of a preliminary injunction.

3. That the Threatened Injury to Movant Outweighs Whatever damage the injunction may cause the opposing party

The third recognized prong in consideration of granting or denying a requested TRO/PI is the Court's consideration of the threatened injury to the Movant outweighs whatever damage the injunction may cause the opposing party.

The injury to the individuals who are charged with violating the instant statute far outweighs the injury to the Defendants if the Honorable Court grant Plaintiff's request for a TRO/PI. Clearly, the fines, potential lost of driving privileges and other associated factors which may come into pay clearly outweighs any damage to the Defendants. The present usage of the instant statute as a revenue collection agent cannot logically be presented as much of a factor against the injury factors caused by the Defendants' continued legal enforcement of the instant statute.

Since the State and the Georgia Department of Public Safety have clearly abdicated their legislatively mandated duties in

relationship to the instant statute, they cannot, in good faith or face, advance to the Honorable Court that they will suffer any harm by the granting of the injunction. The worst case situation is the fact that the State and the Georgia Department of Public Safety will lose a source of illegal revenue which they have repeatedly refused to halt.

4. The Granting of a TRO/PI Will Not be Adverse to Public Interest

The fourth prong in the Court's consideration in connection with a request for a TRO/PI is whether or not the granting of a TRO/PI would be adverse to the Public Interest.

Whether or not the stopping of the State and the Georgia Department of Public Safety enforcement of a statute which is unconstitutional on its present face and constitutionally vague clearly and absolutely meets the necessary legal plateau in order for the Honorable Court to grant the requested TRO/PI.

There should be no question that it is in the Public's interest to have the State of Georgia legally enforce the law as it applies to the instant statute. The State of Georgia and the Georgia Department of Public Safety have wilfully and deliberately refused to comply with the mandatory language of O.C.G.A. § 40-6-315(d). The Defendants have taken the mandatory language that the Georgia Department of Public Safety ***"...shall publish lists of all protective headgear and eye-protective devices by name and by type which have been approved by [Georgia Department of Public Safety]"*** and wilfully and deliberately ignored their required statutory duties. Clearly the Georgia Legislature mandated that the Georgia Department of Public Safety publish the list of all protective headgear and eye-protective devices by name and type that the citizens of Georgia would have reasonable knowledge that any

equipment was in compliance with the instant statute. Under the present perimeters, ***a cantaloupe meets the non-statutory guidelines,*** which the general public does not have readily access to.

Therefore, Plaintiff has clearly attained the necessary legal plateau upon each of the four prongs in order to be entitled to the issuance of the requested TRO/PI.

The Court should scrupulously observe requirements of Rule 65 in the delicate business of granting temporary restraining orders. **Austin v. Altman** 332 F.2d 273 (2nd Cir. 1964); **Leslie v. Penn C. R. Co.,** 410 F.2d 750 (6th Cir. 1969).

Likewise, the Court must determine whether it has jurisdiction over the party to be enjoined before it can issue a preliminary injunction. **Enterprise International, Inc. v. Corporation Estatal Petrolera Ecuatoriana**, 762 F.2d 464 (5th Cir. 1965).

Thus, an application for a temporary restraining order is addressed to the sound discretion of the Court. **Youngstown Sheet & Tube Co. v. Sawyer**, 103 F.Supp. 978 (DC Dist Col. 1952); **Norwalk Core v. Norwald Board of Education**, 298 F.Supp. 203 (D.C. Conn. 1968).

Thus, a prayer for a temporary restraining order is addressed to the equitable discretion and judgment of the Court and the resolution of the questions founded upon irreparable injury to the Plaintiff and the probability of their success. **Gerber v. Seamans**, 332 F.Supp. 1187 (SD NY 1971). The extraordinary nature of ex parte relief requires exceptional scrutiny on the part of the Court as the only real protection

against the acts and actions of the Defendants against the Plaintiff. **Re Sullivan Ford Sales**, 2 BR 350, 5 BCD 1288 (BC DC Me 1980).

In the **United States v. DBB, Inc.**, 180 F.3d 1277, 1286 (11th Cir. 1999), the Eleventh Circuit Court of Appeals, has held that [A] Rule 65 TRO often functions to preserve the status quo until a court can enter a decision on a preliminary injunction application, while a Rule 65 preliminary injunction is often used to maintain the status quo until a court can enter a final. decision granting a permanent injunction or some other final relief."

Likewise, the Eleventh Circuit in **Tefel v. Reno**, 180 E.3d 1286, 1295 (11th Cir. 1999) has stated that [A] party seeking a preliminary injunction must establish the following four factors: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury, (3) that its own injury would outweigh the injury to the non-Movant, and (4) that the injunction would not deserve the public interest. **Haitian Refugee Ctr., Inc. v. Baker**, 949 F.2d 1109, 1110 (11th Cir. 1991) (per curium). A mixed standard of review applies to review of the granting or denying of a preliminary injunction. **Bah v. City of Atlanta**, 103 F.3d 964, 966 (11th Cir. 2997). A district court's decision to grant a preliminary injunction and the denial of a motion to dissolve a preliminary injunction are reviewed for an abuse of discretion. Id.; **Collum v. Edwards**, 578 F.2d 110, 112 (5th Cir. 1978).

Plaintiff advances that the Defendants are illegally enforcing a statute which is unconstitutional upon its face and constitutionally vague based upon the Defendants' deliberate and wilful failure to comply with the mandatory requirements as enacted into law.

While the granting of a TRO/PI against the Defendants may very well force the Defendants to take their statutory obligations into consideration and comply with the mandatory statutory requirements, until that time, Plaintiff respectfully moves for the Honorable Court to grant the requested TRO/PI so that the Defendants, by and through the various state, county and city law enforcement agencies do not continue to enforce alleged violations of the instant statute until such time that the Defendants come into the statutory compliance with the mandatory requirements of the statute in question.

Conclusion

Clearly, Plaintiff has placed before the Honorable Court more than sufficient basis upon the four prongs of consideration in order to be entitled to the issuance of a TRO/PI against the Defendants.

There is more than sufficient evidence that the Defendants have been repeatedly legally challenged in the judicial system of Georgia and the Georgia Judiciary has failed and refused to require the Defendants to adhere to the same laws that the Defendants and the Georgia Judiciary system expects and demands that the citizens of the State of Georgia to adhere to. Since the State of Georgia and the Georgia Judicial system has failed to uphold its required duties to the citizens of the State of Georgia, Plaintiff has moved for the Federal Judiciary to invoke its lawful authority and correct a manifest injustice being committed by the Defendants against the citizens of the State of Georgia.

Plaintiff respectfully moves for the Honorable Court to issue a TRO/PI and direct the Defendants to immediately cease

and desist in enforcing O.C.G.A. § 40-6-315, until the Defendants comply with the mandatory requirements of O.C.G.A. § 4O-6-315(d), or until further order of this Court changes the terms and conditions of the Court's grant of a TRO/PI.

This 4th day of July, 2000.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/_____

John A. Roberts, Esquire
Attorney for Plaintiff
Georgia State Bar #680705

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and accurate copy of the foregoing COMPLAINT, MANDATORY INTERROGATORIES, MOTION FOR A TEMPORARY RESTRAINING ORDER MW/OR IN THE ALTERNATIVE A PRELIMINARY INJUNCTION upon the following parties by placing a copy of the same into an envelope with sufficient postage to ensure delivery and placing the sane into the United States Mail addressed as follows:

Thurbert S. Baker
Attorney General
40 Capital Square, SW.
Atlanta, Georgia 30334

Col. Robert S. Hightower
Georgia Dept. of Public Safety
959 5. Confederate Avenue
Atlanta, Georgia 30371

As well as by faxing a copy of the instant motion to said parties.

This 5th day of July, 2000.

S/_____
John A. Roberts, Esquire
Attorney for Plaintiff
Georgia State Bar #680705

THE ROBERTS LAW FIRM, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, GA 30326
(404) 841-0661

d. Plaintiff's Second Amended Complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. ATLANTA
SEP 20 2000

LUTHER D. THOMAS, Clerk
By Deputy Clerk SH
1 00-CV-1682 TWT

ABATE OF GEORGIA, INC. and
all others similarly situated,

Plaintiff,

vs. CIVIL ACTION FILE
NO.: 1:00-CV-1682-TWT

ROY E. BARNES, in behalf of
the STATE OF GEORGIA,
ROBERT E. HIGHTOWER in behalf
of the GEORGIA DEPARTMENT OF
PUBLIC SAFETY, in his Offical
and Individual Capacity,
JIM WETHERINGTON, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
ROONEY L. BOWEN, III, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
CHIEF HUBERT L. SMITH, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
CHIEF REBECCA F. DENLINGER, in
her Official and Individual
Capacity as a Member of the
Board of Public Safety,
DANIEL M. BRYANT, in his

Official and Individual
Capacity as a Member of the
Board of Public Safety,
SHERIFF JACQUELYN H. BARRETT,
in her Official and Individual
Capacity as a Member of the
Board of Public Safety,
SHERIFF BRUCE HARRIS, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
ROBERT E. KELLER, in his
Official and his Individual
Capacity as a Member of the
Board of Public Safety,
LYDIA J. SARTAIN, in her
Official and Individual
Capacity as a Member of the
Board of Public Safety,
W.M. "DUB" HARPER, JR., in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
WAYNE ABERNATHY, in his
Official and Individual
Capacity as a Member of the
Board of Public Sat ety,
SHERIFF DONNIE HARALSON, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
SHERIFF GREOGORY T. COURSEY,
in his Official and Individual
Capacity as a Member of the

Board of Public Safety,
SHERIFF JAMIL SARA, in his
Official and Individual
Capacity as a Member of the
Board of Public Safety,
BOARD OF PUBLIC SAFETY,
UNKNOWN CITY, COUNTY AND STATE
LAW ENFORCEMENT AGENTS,

Defendants.

SECOND AMENDED COMPLAINT

COMES NOW ABATE OF GEORGIA, INC., Plaintiff, by and through undersigned counsel, and tenders Plaintiff's Amended Complaint and shows the Honorable Court as follows:

I.

Plaintiff is a Georgia corporation and by the filing of the above-styled Complaint is subject to the jurisdiction of the Honorable Court.

II.

Plaintiff is filing this Second Amended Complaint due to the Department of Public Safety providing Plaintiff with the incorrect list for the Members of the Board of Public Safety. Plaintiff is filing this Second Amended Complaint with the correct Members of the Board of Public Safety and only these Members of the Board of Public Safety will be amended parties to this lawsuit.

III.

Defendants, as named in the above-styled Complaint are:

Roy E. Barnes, Governor of the State of Georgia, who can be served by service of process at 203 State Capital, Atlanta, Georgia 30334 (hereinafter referred to as Defendant "Georgia").[1]

Robert E. Hightower, Georgia Department of Public safety, 959 East Confederate Avenue, Atlanta, Georgia 30371, who can be served by service of process on Colonel Robert E. Hightower, at the aforementioned address. hereinafter referred to as Defendant ("GDPS").[2]

Robert E. Hightower, in is Official and Individual capacity of the Georgia Department of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "Hightower").

Jim Wetherington, Commissioner of the Board of Public Safety, in his Official and Individual capacity of the Georgia Department of Public Safety, 959 East Confederate Avenue, Atlanta, GA 30371 (Hereinafter referred to as Defendant "Wetherington").

Jim Wetherington, as Commissioner for the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

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1 Plaintiff has served upon the Governor's Office an ante litem notice for the purposes of waiving of the immunity of said office.

2 Plaintiff has served upon the Georgia Department of Public Safety and the Board of Public Safety an ante litem notice for the purposes of waiving the immunity of said office.

Chief Hubert L. Smith, as a Member of the Board of Public safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Reoney L. Bowen. III., as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Chief Rebecca DenJ.inger, as a Member of the Board of Public Safety, 939 East Confederate Avenue, Atlanta, Georgia 30372. (hereinafter referred to as Defendant "BPS").

Daniel M. Bryant, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Sheriff Jacquelyn H. Barrett, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 9tereinaf tar referred to as Defendant "BPS").

Sheriff Bruce Harris, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Robert S. Keller, as a Member of,the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Lydia J. Sartain, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

W.H. "Dub" Harper, Jr., as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Wayne Abernathy, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371

(hereinafter referred to as Defendant "BPS").

Sheriff Donnie Haralson, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Sheriff Gregory T. Coursey, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Sheriff Jamil Saba, as a Member of the Board of Public Safety, 959 East Confederate Avenue, Atlanta, Georgia 30371 (hereinafter referred to as Defendant "BPS").

Unknown City, County and State Law Enforcement Agents, who are presently unknown to Plaintiff but will be obtained by and through discovery.

IV.

Jurisdiction and venue are properly before the Honorable Court. Plaintiff asserts statutory jurisdiction pursuant to Title 28, United States Code § 1332.. Additional jurisdiction is anchored pursuant to Title 42, United States Code § 1983, and First, Fifth, Fourteenth Amendments of the United States Constitution. Plaintiff has tendered such ante litem notices which waives immunity to said state agency pursuant to Georgia Tort Claims Act as with OCGA § 50-21-26, [3] and jurisdiction pursuant

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3. Plaintiff is advancing claims against the State of Georgia and the Georgia Department of Public Safety and the Board of Public Safety only for injunctive relief and pursuant to said injunctive relief for the said state agencies to be required to return all funds illegally collected by state and its authorized agents which have collected such funds from the enforcement of the instant statute. Plaintiff's 1983, action is directed solely at Defendant Hightower and Defendant Wethintgton, in their Official and individual

to OCGA § 51-12-5.1(b).

V.

Plaintiff advances that the Defendant State of Georgia, by and through Defendant Georgia Department of Public Safety, by and through Defendant Board of Public Safety and numerous city and county law and state law enforcement agencies, have violated statutory and constitutional rights, of the certain individual members of ABATE OF GEORGIA, INC., as well as other individuals who fall within the class of members which the above-styled Complaint covers or pertains to and Plaintiff states the following pertinent facts, in pertinent part, which have violated the rights of the same, to wit:

1. The Georgia Legislature enacted a certain statute which became a standing law in the State of Georgia, which is enforced by the State, Cities and Counties of the State of Georgia, which is codified pursuant to O.C.G.A. § 40-6-315, which said statute states:

> 40-6-315. Headgear and eye-protective devices for riders.
>
> (a) No person shall operate or ride upon a motorcycle unless he is wearing protective headgear which complies with standards established by the Board of Public

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capacities which is allowed since they, as the controlling officers has allowed, aided and abetted in the collection of funds in relationship to the Georgia Department of Public Safety which they knew was illegal based upon the fact that the Georgia Department of Public Safety have and had wilfully failed to enact the pertinent parts of O.C.G.A. Section 40-6-315(d), thereby acting outside his lawful and legal authority by enforcing said statute.

Safety.

(b) No person shall operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he is wearing an eye-protective device of a type approved by the Board of Public Safety.

(c) This Code section shall not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to a person operating a three-wheeled motorcycle used only for agricultural purposes.

(d) The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. ***The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.***

(Ga. L. 1969, p. 732, § 3; Code 1933, § 68A-1306, enacted by Ga. L. 1974, p. 633, § 1; Ga. L. 1984, p. 1329, § 2; Ga. L. 1990, p. 2048, § 5.) (Emphasis Added)

40-6-316. Rules and regulations.

(Code 1933, § 68A-1306, enacted by Ga. L. 1974, p. 633, § 1; Ga. L. 1985, p. 149, § 40; Ga. L. 1990, p. 2048, § 5.)

2. Defendant Georgia, Defendant Hightower, Wetherington and Defendant GDPS, and BPS acting together with those law enforcement for the State of Georgia have illegally issued citations against the Plaintiff's members and others similarly situated for allegedly violating the aforementioned statute.

3. Defendant Georgia, Defendant Hightower, Defendant Wetherington, by and through Defendant GDPS, and BPS have further illegally sanctioned the respective members of the Plaintiff and others cited with alleged violations of the aforementioned statute, by placing points against an alleged violator's driving license which has resulted, in individual cases with suspension of driving privileges, and other sanctions.

4. Defendant Georgia, Defendant Hightower, Defendant Wetherington, by and through Defendant GDPS, and BPS pursuant to the statutory mandates, as passed by the Georgia Legislature, and signed into law by the Governor of the State of Georgia pursuant to O.C.G.A. § 40-6-315(d), required certain acts and actions to be performed by Defendant GPDS by and through Defendant BPS which the instant statute clearly states, to wit:

> The Board of Public Safety is authorized to approve or disapprove protective headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. ***The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.***

(Emphasis Added).

5. Defendant Hightower and Wetherington, by and through Defendant GPDS, and BPS at all pertinents times, acting outside its legal authority, has wilfully failed and refused to comply with the aforementioned statutory mandates pursuant to O.C.G.A. § 40-6-313(d), by the following acts and actions, to wit:

   a. Wilfully failing to publish a list of all protective head gear and eye-protective devices by name and type which have been approved by Defendant GPDS by and through Defendant BPS;

   b. Wilfully failing to publish a list of all protective head gear and eye-protective devices by name and type which have been approved by Defendant GPDS, by and through Defendant BPS, so that members of the Plaintiff organization and all others similarly situated have knowledge of approved equipment as required by the statute in question.

6. Defendant Georgia, and Defendant Hightower, Defendant Wetherington, by and through Defendant GDPS and Defendant BPS, as well as other state, city and county law enforcement agencies, have illegally enforced alleged violations of O.C.G.A. § 40-6-315, against members of the Plaintiff organization and against other individuals similarly situated, knowing that said statute cannot be enforced based upon the wilful and deliberate failure of Defendant Georgia, by and through Defendant GDPS to comply with the statutory mandates pursuant to O.C.G.A. § 40-6-315(d).

7. Defendant Georgia and Defendant Hightower, Wetherington, by and through Defendant GDPS and Defendant BPS, knowing that they have wilfully failed

and refused to comply with the statutory mandates of O.C.G.A. § 40-6-315(d), have, never the less, allowed, sanctioned and aided and abetted such illegal citations issued pursuant to said violation of said statute, by:

a. Allowing unknown state, city and county law enforcement agencies and officers to issue citations against members of the Plaintiff's organization as well as other individually situated persons claiming that the same has violated O.C.G.A. § 40-6-315;

b. Allowing unknown state, city and county law enforcement agencies and officers to thereinafter prosecute alleged violations of O.C.G.A. § 40-6-315, to find alleged violators of said statute to be guilty of violating said statute, knowing that there can be no violations of the said statute based upon the failure to the Defendants to comply with the statutory mandates of O.C.G.A. § 40-6-315(d).

c. Allowing unknown state, city and county law enforcement agencies and officers to thereinafter prosecute alleged violations of O.C.G.A. § 40-6-315, to illegally find said alleged violators guilty and impose and collect illegal fines against the same.

d. Allowing unknown state, city and county law enforcement agencies and officers to illegally use said statute for the purposes of illegally collecting revenue for alleged violations of said statute.

8. Defendant Georgia, and Defendant Hightower, Defendant Wetherington, Defendant GDPS, by and through Defendant BPS have allowed, sanctioned, aided

and abetted, certain parts of the Georgia judiciary to aid the Defendants in enforcing the instant statute and the collection of said illegal revenue against members of the Plaintiff and other similarly situated individuals.

COUNT ONE

UNCONSTITUTIONAL STATUTE

Plaintiff realleges and incorporates Section IV., subsections 1., through 8., and states that the Defendants have enforced an unconstitutional statute by the following acts and actions, to wit:

A. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS,, by and through Defendant BPS have wilfully failed to abide by the mandatory language of O.C.G.A. § 40-6-315(d), by wilfully failing and refusing to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS in wilful violation of O.C.G.A. §40-6-315(d).

B. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS have wilfully enforced the instant statute knowing that there exists no ***lists of all protective headgear and eye-protective devices by name*** **and type** ***which*** **have** ***been approved by*** Defendant GDPS **in wilful violation of O.C.G.A. § 40-6-315(d)**.

C. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS have allowed, sanctioned, aided and abetted state, city and county law enforcement agencies

to enforce said statute, knowing that Defendant GDPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant GDPS **in wilful violation of O.C.G.A. § 40-6-315(d).**

D. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS knows that no citizen of the State of Georgia can comply with the said statute based upon the fact that Defendant BPS has failed to ***publish lists of all protective headgear and eye -protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 40-6-315(d)**.

E. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS has authorized the illegal enforced the said statute knowing it is unconstitutional based upon the fact that Defendant BPS has wilfully failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 40-6-315(d)**.

F. Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS, as well as state, city and county law enforcement agencies continue to enforce said statute knowing that it is unconstitutional based upon Defendant GDPS's wilful failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G..A. § 40-6-315(d)**.

G. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS, as well as state, city and county law

enforcement agencies continue to collect revenue from the continuing enforcement of the said statute knowing at all times that Defendant BPS's failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. §404-315(d)**, makes the statute unconstitutional.

COUNT TWO

UNCONSTITUTIONALLY VAGUE

Plaintiff realleges and incorporates Section IV., subsections 1., through 8., and states that the Defendants have enforced an unconstitutional statute by the following acts and actions, to wit:

A. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS have wilfully failed to abide by the mandatory language of O.C.G.A. §40-6-315(d), by wilfully failing and refusing to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 404315(d)**.

B. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS have wilfully enforced the instant statute knowing that there exists no ***lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. §40-6-315(d)**.

C. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS have allowed,
sanctioned, aided and abetted state, city and county law

enforcement agencies to enforce said statute, knowing that Defendant BPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. §40-6-315(d).**

D. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS know that no citizen of the State of Georgia can comply with the said statute based upon the tact that Defendant BPS has failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.Q.A. §404.315(d).**

E. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS has enforced the said statute knowing it is unconstitutional based upon the fact that Defendant BPS has wilfully failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been*** approved *by* Defendant BPS **in wilful violation of O.C.G.A. §40-6-315(d).**

F. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS, as well as state, city and county law enforcement agencies continue to enforce said statute knowing that it is unconstitutional based upon Defendant BPS's wilful failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 40-6-315(d).**

G. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS, as well as state, city and county law

enforcement agencies continue to collect revenue from the continuing enforcement of the said statute knowing at all times that Defendant BPS's failure to **publish lists of all protective headgear and eye-protective devices by name and type which have been approved by** Defendant BPS **in wilful violation of O.C.G.A. § 404-315(d)**, makes the statute unconstitutionally vague.

COUNT THREE
INJUNCTIVE RELIEF

Plaintiff requests the following injunctive relief against the Defendant State of Georgia and Defendant Georgia Department of Public Safety, to wit:

A. That the Court suspend further legal enforcement of the statute in question until such time that the State of Georgia, by and through Defendant GDPS and Defendant BPS complies with the statutory mandates to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS.

B. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order invalidating all previous issued criminal citations issued and prosecuted by state, city and county law enforcement agencies and compel that said agencies immediately refund all fines, including applicable interest as allowed by law, to be paid by the agencies which received said funds.

C. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order invalidating any sanctions, penalties or other acts or actions taken against any person by Defendant GDPS against the individual's driving license,

and if monetary sanctions were imposed to refund the same, including applicable interest as allowed by law, to be paid by Defendant GDPS, as collected by said Defendant to each individual.

D. That the Court, upon finding that the Defendants have illegally enforced the instant statute under challenge, issue an injunctive order that there shall be no further enforcement of said statute until Defendant Georgia, Defendant Hightower, Defendant Wetherington, and Defendant GDPS, by and through Defendant BPS, publish lists of all protective headgear and eye-protective devices by name and type which have been approved by Defendant BPS, with the following limitations being utilized prior thereto:

a. That the State of Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant by and through Defendant BPS, provide each licensed individual within the state of Georgia who is authorized to ride a motorcycle, to receive a list of all approved equipment and provide that a period of not less than ninety (90) days, shall have passed prior to enforcement so as to enable said individual to have sufficient time to obtain such approved equipment.

b. That the State of Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS, or other appropriate state agencies, at the county level shall issue, with the annual registration of each such motorcycle or other such equipment which falls under said statute, shall receive a list of such approved equipment and provided a ninety (90) day period to obtain such authorized and/or approved equipment prior to further enforcement of said statute by state, city or county authority.

COUNT FOUR
DECLARATORY JUDGMENT

Plaintiff requests the Honorable Court grant Plaintiff Declaratory Judgment finding the following to wit:

A. That the Court find that Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant BPS wilfully failed to comply with the statutory mandates to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 40-6-315(d)**.

B. That the Court find that the Defendant have illegally enforced the instant statute under challenge, issued numerous criminal citation, the same being illegally prosecuted by state, city and county law enforcement agencies and same illegally collected finds pursuant to the illegal enforcement of said statute.

C. That the Court find that Defendant Hightower, by and through Defendant GDPS has imposed sanctions, penalties or other acts or actions against persons charges by Defendant GDPS against the individual's driving license, and illegally imposed monetary sanctions against individuals for alleged violations of said statute.

D. Find that Defendant Georgia and Defendant Hightower, by and through Defendant GDPS has sanctioned, aided and abetted numerous state, city and county law enforcement agencies to illegally charge individuals with violations of the statute under challenge.

E. Find that Defendant Georgia and Defendant Hightower, by and through Defendant GDPS has sanctioned, aided and abetted numerous state, city and county law enforcement agencies to illegally charge individuals with violations of the statute under challenge purely for financial gain and knowingly allowed such violation of those individual's civil rights by enforcement of the said statute under challenge.

COUNT FIVE

PUNITIVE DAMAGES

Plaintiff realleges and incorporated Section IV., subsections 1., through 8., Count One, Count Two into Count Five and advances that the Plaintiff and all individuals similarly situated are entitled to punitive damages against the Defendants, to wit:

A. That Defendant Hightower, by and through Defendant GDPS and Defendant Wetherington, by and through Defendant Members of the BPS have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all those individual persons similarly situated by:

a. Illegally enforcing a statute when Defendant Members of the BPS failed and continue to refuse to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant Members of the BPS **in wilful violation of O.C.G.A. § 40-6-315(d).**

b. Illegally charging individuals under said statute when the Defendants knew that there could be not violation of the statute in question based upon the w ful and deliberate failure of Defendant BPS to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant BPS **in wilful violation of O.C.G.A. § 40-6-315(d).**

B. That Defendant Hightower, by and through Defendant GDPS and Defendant Wetherington, by and through Defendant Members of the BPS, have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all other individuals who have been charges, prosecuted and fined for violations of said unconstitutional statute.

C. That Defendant Hightower, by and through Defendant GDPS and Defendant Wetherington, by and through Defendant Members of the BPS, have wilfully violated the statutory and constitutional rights of the Plaintiff's members and all other individuals who have been charged, prosecuted and fined for violations of said unconstitutional statute by further punishing Plaintiff's members and other individuals by sanctioning said individuals driver's licenses and in specific cases suspending licenses and charging said individuals to pay to have suspended driving licenses reinstated after allowed by the laws of Georgia concerning suspended driver's licenses.

D. That the Defendant Hightower, as well as other state, city and county legal authorities have wilfully violated the

rights of the members of the Plaintiff's organization, as the rights of others similarly situated by the illegal enforcement of the statute in question, and did so for purely financial gain and profit by said parties, knowing that they were at all times committing said violations under the exercise of the statute in question.

E. That the Defendant Hightower, as well as other state, city and county legal authorities, knowing of the failure of the said statute to meet the legislative law requirements, as passed by the Georgia Legislature and signed into law by the Governor of the State of Georgia, have, by the aforementioned acts and actions, wilfully acted outside of their legal authority by the prosecution of the members of the Plaintiff's organization, as well as other persons charged with violations of said statute.

F. That Defendants Hightower and Wehtherington, and the Defendant Members of the BPS, have knowingly, wilfully and with deliberate intent to cause financial harm and injury have committed such tortuous conduct in wilful violation of **§ 40-6-315(d)**, the same being in violation of O.C.G.A. **§ 51-12-5.1(b)**.

COUNT SIX

VIOLATION OF TITLE 42 U.S.C. § 1983

Plaintiff realleges and incorporates Section IV., subsections 1., through 8., Count One, Count Two, Count Five into Count Six and advances that the Defendants have violated the civil and constitutional rights of the Plaintiff's members and other individual similarly situated, by the following acts and

actions, to wit:[4]

A. That Defendant Hightower and Defendant Wetherington, by and through the wilful and intentional conduct of Defendant GDPS and Defendant Members of BPS, by and through the wilful and deliberate failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** Defendant Members of hte BPS in **in wilfull violation of O.C.G.A § 40-6-315(d)**, has violated and continues to violate the rights of the Plaintiff's members and other similarly situated enforcing the statute under challenged as required and mandated by the Georgia Legislature when the same was passed and enacted into law.

B. Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant Members of the BPS's wilful and intentional failure of Defendant NPS by and through the wilful and deliberate failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS in wilful violation of O.C.G.A. § 40-6-315(d)**, has invalidated the instat statute so that it could not be legaly enforced pursuant to the wilful and deliberate failure to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant Members of the BPS,

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4. Pursuant to the ante litem notices as tendered by Plaintiff which waives the immunity of the Defendants to the limits of the insurance carried by the individual agencies of the Governor's Office and the Georgia Department of Safety and the Board of Public Safety pursuant to OCGA § 50-21-26.

prior to any enforcement of the said statute by legal authorities at the state, city and county levels within the State of Georgia.

C. That Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through the conduct of Defendant Members of the BPS and all other state, city and county legal authorities have enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant BPS to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant BPS.

D. That Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through the conduct of Defendant Members of the BPS and all other state, city and county legal authorities have enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant BPS to publish the list of all protective headgear and eye-protective devices by name and type which should have been approved by Defendant BPS, based upon the fact that a cantaloupe could be utilized and meet the requirements of the statute in question.

E. That Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through the conduct of Defendant Members of the BPS and all ether state, city and county legal authorities have illegally enforced a statute which they knew could not be legally enforced based upon the wilful and deliberate failure of Defendant BPS to publish the list of all protective headgear and eye-protective devices by name

and type which should have been approved by Defendant BPS, thereby violating the civil and constitutional rights of all individuals who have been prosecuted under said statute.

F. That Defendant Hightower and Wetherington and others, yet unknown have knowingly acted outside their legal and lawful authority by allowing, aiding and abetting and also sanctioning persons who have not committed a violation of the law based upon the fact that the named defendants have wilfully failed and refused to act within the law and perform their statutory functions but have acted outside the same be allowing, aiding and abetting illegal enforcement of the statute in contention, knowing at all times that their conduct was outside their legal and lawful authority.

COUNT SEVEN

VIOLATION OF STATUTORY CONSTITUTIONAL RIGHTS

Plaintiff advances that the acts and actions of Defendant Georgia and Defendant GDPS, have violated plaintiff's member's constitutional rights under and pursuant to the following United States constitutional provisions, to wit:

A. Violation of the first Amendment of the United States Constitution

a. Defendant Georgia, by and through the various state, city and county law enforcement agencies have utilized the Georgia judicial system to prosecute Plaintiff's members and other

individuals charged with violating O.C.G.A § 40-6-315, when Defendant Members of the BPS wilfully failed to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS, in wilful violation of O.C.G.A. § 40-6-315(d).**

b. By such failure by Defendant Members of the BPS to to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS, in wilful violation of O.C.G.A. §40-6-315(d)**, caused Plaintiff's members and other individuals to be charged in the Georgia judicial system when there was no legitimate basis for any such charges to be raised and/or prosecuted.

c. By such charges being raised and prosecuted within the Georgia judicial system, Plaintiff's members and other individuals charged with violation of said statute were illegally prosecuted for violation a statute which was constitutionally vague and/or unconstitutional based upon the wilful and deliberate failure of Defendant GDPS, by and through Defendant Members of the BPS to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS, in violation of O.C.G.A. §40-6-315(d).**

d. By such aforementioned conduct, Plaintiff's members and other individuals were constitutionally deprived for obtain fair and meaningful access to the Georgia judicial system which knowingly utilized the illegal prosecution pursuant to the instant statute against said individuals for pure financial gain of the state, city and county in which each such judicial occurrence took place wherein any such person was prosecuted for an alleged violation of said statute.

B. Violation of Fifth Amendment Rights

a. Plaintiff advances that the conduct, as heretofore stated in the aforementioned section dealing with the Defendants' conduct being in violation of the first Amendment of the United States Constitution advances that the institution, prosecution in the courts of the State of Georgia and subsequent fines and other penalties imposes against the Plaintiff's members and other individuals charged with alleged violations of the statute in question constitutes a violation of the fifth Amendment of the United States Constitution, when the statute in question is unconstitutionally vague.

b. Plaintiff's members and other charged, prosecuted and sanctioned imposed has violated the Fifth Amendment rights of each such individual based upon the fact that each such person's due process rights were violated by the illegal charging, prosecution and penalties imposed when there could not exist any violation of said statute based upon Defendant GDPS by and through Defendant Members of the BPS's

wilful and deliberate failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS, in violation of O.C.G.A. §40-6-315(d).**

c. Each such individual was and has been constitutionally deprived of their Fifth Amendment rights of due process against being charged with an offense which such statute does not constitute an offense due to the wilful and deliberate failure of Defendant GDPS by and through Defendant Members of the BPS to ***publish lists off all protective headgear and eye-protective devices by name and type which have been approved by*** **Defendant BPS, in violation of O.C.G.A. §40-6-315(d),** which each such person could know that their conduct violated the statute in question.

C. Violation of Fourteen Amendment Rights

a. Plaintiff's members and all other charged with a violation of the statute under challenge, have had their fourteenth Amendment rights violated by Defendant Georgia, Defendant Hightower, Defendant Wetherington and Defendant GDPS, by and through Defendant Members of the BPS, as well as other state, city and county law enforcement agencies and the Georgia judicial system by failing to accord each such person or party equal protection of the laws of the State of Georgia which are clearly defined and that a reasonable person could know versus the instant

statute which cannot presently state an offense based upon Defendant GDPS by and through Defendant Members of the BPS's wilful and deliberate failure to **publish *lists off all protective headgear and* eye-protective devices *by name and* type *which have been approved by* Defendant BPS, in violation of O.C.G.A. § 40-6-315(d)**, by which each person which would be subject to said statute would clearly understand what protective headgear and eye-protective devices by name have been approved by the Georgia Department of Public Safety as legislatively mandated pursuant to O.C.G.A.. §40-6-315(d).

b. Said Defendants and others have wilfully violated the equal protection rights of said individuals under and pursuant to the Fourteenth Amendment of the United States Constitution by wilfully failing and refusing to have Defendant GDPS by and through Defendant Members of the BPS' s failure to ***publish lists of all protective headgear and eye-protective devices by name and type which have been approved by* Defendant BPS, in violation of O.C.G.A. § 40-6-315(d)**, and such failure being in violation of the Fourteen Amendment rights of each such person or party.

c. That the Defendants and others allowed, sanctioned and aided and abetted the denial of the rights guaranteed under the Fourteenth Amendment of the United States Constitution to the Plaintiff's members who have been charged,

prosecuted and sanctioned for a violation of the statute under challenge, so that the said statute could be utilized for the sole and exclusive purposes of financial gain by said state, city and county law enforcement agencies and the judiciary entitles that have been utilized in the charges being placed and thereinafter prosecuted against said persons.

VI.

Plaintiff demands a jury trial and the following relief:

A. Actual Damages, the amount which relates to Count 3., 4., and 5., as determined during discovery. Said actual damages being the total amount having been sanctioned each individual who has been sanctioned for violation of the relevant statutes.

B. Actual Damages, the amount being the financial limits of the insurance policy of each governmental agency pursuant to the waiver of the immunity of each said state agency pursuant to the legal invocation of the ante litem notices sent pursuant to OCGA § 50-21-26.

C. Punitive Damages in Excess of Ten Million ($10,000,000) Dollars or such amount that the jury determines should be assessed against Defendant Hightower and Wethington and other defendants for their wilful and deliberate conduct against the Plaintiff's members and other individuals subjected to the acts and actions of the Defendants and others which have been approved, sanctioned or aided and abetted by the Defendants.

D. That the Court grant Injunctive Relief as stated pursuant to Count Three of the Plaintiff's Complaint. That such punitive damages are authorized by Georgia law pursuant O.C.G.A. **§ 51-12-5.1(b)**.

E. That the Court grant Declaratory Judgment as stated pursuant to Count Four of the Plaintiff's Complaint.

F. That the Court grant Plaintiff the cost of the prosecution of the above-styled cause of action, including, but not limited to attorney fees and other costs incurred based upon the violation of the Plaintiff's members civil and constitutional rights by the Defendants.

G. That the Honorable Court grant any other relief that the Court deems that the Plaintiff's members should be entitled to under law or equity may allow or that the Honorable Court deems appropriate.

This 20th day of September, 2000.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/_____

John A. Roberts
Attorney for the Plaintiff
Georgia State Bar No.: 608705

THE ROBERTS LAW FIRM, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.

Atlanta, Georgia 30326
(404) 841-0661

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing **SECOND AMENDED COMPLAINT** upon the following parties by placing a copy of the same into an envelope with sufficient postage to ensure delivery and placing the same into the United States Mail addressed as follows:

Patricia Downing
Senior Assistant Attorney General
40 Capital Square, S.W.
Atlanta, Georgia 30334-1300

As well as by faxing a copy of the instant motion to said parties.

This 20th day of September, 2000.

Respectfully submitted,

THE ROBERTS LAW FIRM, P.C.

S/_____
John A. Roberts
Attorney for the Plaintiff
Georgia State Bar No.: 608705

THE ROBERTS LAW FIRM, P.C.
One Live Oak Center, Suite 980
3475 Lenox Road, N.E.
Atlanta, Georgia 30326
(404) 841-0661

e. Order by the District Court Denying Plaintiff's Motion for Temporary Restraining Order or Preliminary Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABATE OF GEORGIA, INC., and all others similarly situated,

Plaintiffs,

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U.S.D.C. ATLANTA
AUG 25 2000
LUTHER D THOMAS, Clerk
By: S Sewell
Deputy Clerk

v.

CIVIL ACTION FILE
NO. I :00-CV- 1 682-TWT

STATE OF GEORGIA and
GEORGIA DEPARTMENT
OF PUBLIC SAFETY,

Defendants.

ORDER

This case is before the Court on Plaintiffs' Motion for a Temporary Restraining Order or Preliminary Injunction [Doc. 3]. The Court has considered the motion, Defendant's response, Plaintiffs' reply, and the testimony, exhibits and argument presented at a hearing on August 7, 2000. The Court finds that Plaintiff has failed to carry its burden of persuasion to authorize the extraordinary remedy of a preliminary injunction or a temporary restraining order.

First, Plaintiff has not shown a sufficient Likelihood of success on the merits. Even assuming for the sake of discussion that the Georgia Department of Public Safety and the Georgia Court of Appeals are improperly interpreting Georgia law, that does not authorize the federal court to provide a remedy. In

order to involve this Court, the Plaintiff must show that the State is violating the federally protected rights of its members. A claim of statutory vagueness creates a cause of action only when it may chill or inhibit a constitutional right. There is no constitutional right to ride a motorcycle with a baseball cap.

Plaintiffs due process and equal protection claims are also unlikely to prevail because the Plaintiffs members have an adequate remedy at law in state court. The Plaintiffs evidence shows the availability of a state remedy in that in two orders submitted by Plaintiff, the Court dismissed citations against individuals charged with violating the law.

Second, Plaintiff has not shown irreparable injury. This statute has been in effect for ten years and Plaintiff has not shown that there would be irreparable injury from the failure of this Court to provide extraordinary relief now, especially in light of the evidence that the members have an adequate remedy at law in state court.

Third, in a balancing of the equities, the State has an interest in enforcing the helmet law which outweighs a riders s interest in knowing for certain if a helmet meets the State's requirements.

The Court, therefore, DENIES Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction [Doc. 3].

Additionally, Defendant's Motion to Dismiss the Complaint [Doc.5]is DENIED in light of the Amended Complaint filed by Plaintiffs.

SO ORDERED, this 23rd day of August, 2000.

S/_____

THOMAS W. THRASH, JR.
United States District Judge

Prepared by:

PATRICIA DOWNING 228350
Senior Assistant Attorney General
Department of Law
40 Capitol Square
Atlanta, GA 30334-1300

[Modified by the Court.]

f. Order by the District Court Granting Defendant's Motion to Dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABATE OF GEORGIA, INC.,
and all others similarly situated,

FILED IN CHAMBERS
THOMAS W. THRASH JR.
U.S.D.C. ATLANTA
APR 4 2001
LUTHER D. THOMAS, Clerk
By Deputy Clerk

Plaintiffs,

v.

CIVIL ACTION FILE
NO. 1:OO-CV-1682-TWT

STATE OF GEORGIA and
GEORGIA DEPARTMENT
OF PUBLIC SAFETY,

Defendants.

ORDER

This is an action challenging the constitutionality of Georgia's motorcycle helmet law. It is brought pursuant to U.S.C. § 1983 and is before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [Doc. 21] and Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint [Doc. 25]. For the reasons set forth below, the Motion to Dismiss the Amended Complaint is denied as moot, and the Motion to Dismiss the Second Amended Complaint is granted.

I. BACKGROUND

Plaintiff ABATE of Georgia, Inc. ("ABATE") brings this suit on behalf of itself and all other similarly situated. ABATE is an acronym for American Bikers Active Toward Education. Its

main purposes are to promote motorcycling and the rights of motorcyclists. The named Defendants in this case are Roy E. Barnes, in his official capacity as Governor of Georgia, Commissioner Robert E. Hightower of the Georiga Department of Public Safety in his official and individual capacities, the Georgia Department of Public Safety, and the following members of the Georiga Board of Public Safety in their official and individual capacities: Jim Wetherington, Rooney L. Bowen III, Hubert L. Smith, Rebecca F> Denlinger, Daniel M. Bryant, Jacquelyn H. Barrett, Bruce harris, Robert E. Keller, Lydia J. Sartain, W.H. "Dub" Harper, Wayne Abernathy, Donnie Haralson, Gregory T. Coursey and Jamil Saba. Plaintiffs also have named as Defendants "Unknown City, County, and State Law Enforcement Agents."

The Georgia General Assmbly has enacted a statute that requires all persons to wear "protective headgear" while operating or riding a motorcycle. At the time this action was filed, the statute, O.C.G.A. § 40-6-315, provided:

> (a) No person shall operate or ride upon a motorcycle unless he or she is wearing protective headgear which complies with standards established by the Board of Public Safety.
>
> (b) No person shall operate or ride upon a motorcycle if the motorcycle is not equipped with a windshield unless he or she is wearing an eye-protective device of a type approved by the Board of Public Safety.
>
> (c) This Code section shall not apply to persons riding within an enclosed cab or motorized cart. This Code section shall not apply to a person

operating a three-wheeled motorcycle used only for agricultural purposes.

(d) The Board of Public Safety is wuthorized to approve or disapprove headgear and eye-protective devices required in this Code section and to issue and enforce regulations establishing standards and specifications for the approval thereof. The Board of Public Safety shall publish lists of all protective headgear and eye-protective devices by name and type which have been approved by it.

O.C.G.A. § 40-6-315 (Supp. 1999). The statute was amended in the 2000 session of the Georgia General Assembly to substitute the newly created Commissioner of Motor Vehicle Safety as the applicable regulatory authority, in the place of the Board of Public Safety, effective July 1, 2001. O.C.G.A. § 40-6-315 (Supp. 2000).

Pursuant to the authority granted by the statute, the Board of Public Safety has promulgated rules and regulations that establish standards for headgear and eye-protective devices. See Ga. Comp.R.&Regs.r. 570-12-.01 to 010 (2000) (regulating eye-protective devices); id. at r. 570-13-.0l to .10 (regulating motorcycle headgear). These regulations define technical standards that acceptable headgear and eye-protective devices must satisfy. The regulations also require that manufacturers affix a permanent label showing that the equipment complies with the applicable standard. See id. at r. 570-12-.10 (eye-protective device); id. at r. 570-13-.05 (headgear). Helmets are held tot he standards set by the United States Department of Transportation. See id. at r. 570-13-.O1(l) ("Future reference to standards as for specifications, statue [sic] or regulations will be the current version of the United States

Department of Transportation, National Highway Traffic Safety, Federal Motor Vehicle Safety Standards; Motorcycle Helmets. This will permit automatic adjustment to future revisions or adjustments in the standards.").

Compliance requirements for eye-protective devices is determined in accordance with those test methods described in Sections 6.3.4.1.1, 6.3.4.1.2 and 6.3.4.1.3 of the American Stardards Institute Standard Z87.1-1968, September 18, 1968, "Eye and Face Protection" and explained in Section 10.1 of the National Bureau of Standards Circular 533, May 20, 1953, "Method for Determining the Resolving Power of Photographic Lenses. Id. at r. 570-12-.05(e). It is undisputed that the Board of Public Safety has not published lists of all protective headgear and eye-protective devices by name and type which have been approved by it.

Plaintiffs filed this action to challenge the constitutionality of O.C.G.A. § 40-6-315. First, Plaintiffs contend that the Board of Public Safety's failure to publish a list of approved headgear and eye protection devices violates Plaintiffs' fights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Second, Plaintiffs contend that the requirements that motorcyclists wear headgear and eye-protective devices are unconstitutionally vague. Plaintiffs argue that the failure of the Board of Public Safety to publish lists of approved gear has prevented ABATE's members and others similarly situated from knowing what equipment satisfies the requirements of O.C.G.A. § 40-6-315. Consequently, Plaintiffs claim they have been issued citations for allegedly violating the statute resulting in points being placed on their driver's licenses, suspension of driving privileges, and other sanctions.

Plaintiffs filed suit in this court on July 5,2000, against

the State of Georgia and the Georgia Department of Public Safety. Plaintiffs also filed a Motion for a Temporary Restraining Order and/or in the Alternative a Preliminary Injunction [Doc. 3]. Plaintiffs filed and Amended Complaint on August 4, 2000 [Doc. 7]. The Amended Complaint removed the State of Georgia and Department of Public Safety as Defendants and named in their stead Governor Barns, Commissioner Hightower, the Board of Public Safety, Public Safety Board member Jim Wetherington, and Unknown City, County and State Law Enforcement Officers. The Court held a hearing on the temporary restraining order. The Court also denied Defendants' Motion to Dismiss the original Complaint in light of Plaintiffs having three days before filed an Amended Complaint. Thereafter, on August 25, 2000, the Court entered a written Order [Doc. 9] explaining its decision at the August 7 hearing. On September 20, 2000, Plaintiff filed a Second Amended Complaint [Doc. 10]. The Second Amended Complaint names as Defendants Governor Barns, Commissioner Hightower, Mr. Wetherington, all additional members of the Board of Public Safety not previously names, the Board itself as an entity, and Unknown City, County and State Law Enforcement Agents. Plaintiffs seel declaratory kidgment, injunctive relief, compensatory damage, $10 million in punitice damages, and attorneys' fees and costs. Defendants have filed motions to dismiss both the Amended Complaint and Second Amended Complaint. In light of the Plaintiff having filed a Second Amended Complaint, the Motion to Dismiss the Amended Complaint it moot. This Order consequently addresses only the Second Amended Complaint and Defendants' motion that it should be dismissed.

II. MOTION TO DISMISS STANDARD

A complaint should be dismissed pursuant to Rule I 2(b)(6) only where it appears beyond doubt that no set of facts

could support the plaintiffs claims for relief. Fed. R. Civ. P. 12(b)(6); Conley v. Gibson, 355 U.S. 41, 47 *(1957);* Linda v. Portocarrero, 963 F.2d 332,334(11th Cir. 1992). In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff. Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 994-95 (11th Cir. 1983). Notice pleading is all that is required for a valid complaint. Lombard' s, Inc. v. Prince Mfg. Inc., 753 F.2d 974, 975 (11th Cir. 1985). Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the wounds upon which it rests. Id.

III. DISCUSSION

Many states have enacted statutes that require motorcyclists to wear protective headgear. See generally, Alan S. Wasserstrom, Annotation, Validity of Traffic Regulation Requiring Motorists to Wear Helmets or Other Protective Gear, 72 A.L.R.5th 607, 607 (1999). Motorcycle helmet laws generally require motorcyclists to wear helmets or other protective devices that have been approved by a state agency. Id. at 619-20. The statutes "reflect a widespread effort to combat the rising death and injury toll of accidents that involve motorcyclists." Id. at 620. Motorcyclists have mounted a variety of challenges to the constitutional validity of these statutes. See, e.g., Picou v. Gillum, 874 F.2d 1519,1520 (11th Cir. 1989) ("This appeal presents us with the latest in a long line of challenges to the constitutionality of mandatory helmet laws."). Plaintiffs in this case challenge the constitutionality of Georgia's statute, O.C.G.A. § 40-6-315. Defendants respond that the suit should be dismissed for failure to state a claim upon which relief can be granted.

Defendants contend that Plaintiffs' Second Amended Complaint should be dismissed for five reasons. First, Defendants contend that Plaintiffs have not adequately alleged any violation of their federal constitutional rights. Plaintiffs claim violations of unspecified First Amendment rights, their Fifth Amendment[1] right to due process on grounds that they cannot determine what headgear is required pursuant to O.C.G.A. § 40-6-315, and their Fourteenth Amendment right to equal protection. Plaintiffs' argument underlying all these claims is that O.C.G.A. § 40-6-315 and the regulations promulgated pursuant to it are unconstitutionally vague:

> Thus, Defendant's advancement of Regulations 570-13-.01 through .10 utterly fails to meet the total statutory requirements as mandated by the Georgia Legislature clearly within the statute in

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Although Plaintiffs identify their due process claim as being brought pursuant to the Fifth Amendment, any due process claim must be brought pursuant to eht Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Due Process Clause. The Supreme Court ruled in Barron v. Mayor & City Counsil of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833), that the first ten amendments tot he Constitution – the Bill of Rights – do not apply to the states. Since the passage of the Fourteenth Amendment, however, the Supreme Court has over time held in carious cases that the Fourteenth Amendment incorporates most of the protections in the Bill of Rights. Addiitonally, the Fourteenth Amendment includes its own Due Process Clause prohibiting deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend.XIV. SEE GENERALLY John E. Nowak & Ronald D. Rotunda, Constitutional Law § 10.2 (5th ed. 1995) (explaining incorporation doctrine).

> question, as those regulations cannot be intelligently applied by the citizens of the State of Georgia so as to make an intelligent and knowledgeable determination *of what does or does not meet the statutory requirements* necessary *to be in compliance with the instant statute* in question.

(Plaintiffs Response & Opposition to Defendant's Motion to Dismiss Plaintiffs Second Amended Complaint, at 13 (emphasis in original).) [Doc. 30]

Plaintiffs do not state explicitly whether they are making a facial challenge, an as-applied challenge, or both. Consequently, construing the Second Amended Complaint in the light most favorable to Plaintiffs, the Court will presume that they are making both. A facial challenge to a statute asserts that the statute is unconstitutional on its face. In other words, the challenge asserts that the statute is unconstitutional generally and without reference to any particular set of facts. United States v. Salerno, 481 U.S. 739, 745 n.3 (1987). An as-applied challenge, in contrast, asserts that the statute is unconstitutional because of the manner in which it was applied in the particular case. Id.

A "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger generally must establish that no set of circumstances exists under which the challenged statute would be valid." Id. at 745. The fact that an act "might conceivably operate unconstitutionally under some set of circumstances is insufficient to render it wholly

invalid" since the Supreme Court does not recognize "an 'overbreadth' doctrine outside the limited context of the First Amendment." Id. In other words, where a law does not implicate First Amendment rights, it can be challenged for vagueness only "as applied," unless the enactment is "impermissibly vague in all its applications." Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1493-94 (9th Cir. 1996); see also Ritter v. State, 258 Ga. 551, 552 (1988) ("Ritter also complains that O.C.G.A.§ 40-6-315 is unconstitutionally vague, in that it does not give the cyclist reasonable notice of the type of headgear that must be worn. However, we find that Ritter has no standing to make the foregoing vagueness challenge, because Ritter wore no helmet and thus engaged in conduct which the statute clearly proscribes.").

In this case, Plaintiffs have alleged a First Amendment violation, but they fail to specify the nature of the alleged violation.[2] Plaintiffs have cited no cases that operating or riding a motorcycle without a helmet is an exercise of their rights of free speech, freedom of religion or their right to peaceably assemble and petition the government for redress of grievances. The Court on its own research has found no such cases. Without any case support whatsoever, the Court refuses to Broaden the First Amendment by concluding that it is implicated in the enforcement of motorcycle helmet laws. The Georgia statute regulates conduct rather than speech or the exercise of religion. There is no First Amendment right to ride a motorcycle wearing a baseball

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The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

cap, a bandana, or bareheaded.

Plaintiffs also allege a due process violation on grounds that a motorcyclist cannot determine whether he is meeting the headgear requirements of the statute. This facial due process challenge, however, must fail because the statute clearly proscribes some conduct, such as riding a motorcycle without any protective head-covering whatsoever. An as-applied challenge also must fail because as-applied challenges are fact-specific. They cannot be brought on behalf of a class; they must be brought on a case-by-case basis. Schall v. Martin, 467 U.S. *253,* 268 n.18 (1984). A court "will not sift through the entire class to determine whether the statute was constitutionally applied in each case." Id. In this case, Plaintiffs have not provided any specific facts surrounding application of O.C.G.A. § 40-6-315 to a single member, much less all members of the class. Consequently, it would be impossible for the Court to engage in an as-applied analysis even if legal precedent allowed it to do so.

Additionally, there is no substantive due process privacy right implicated in this case. The Eleventh Circuit has explained in another motorcycle helmet case that "[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road." Picou v. Gillum, 874 F.2d 1519, 1521(11th Cir. 1989). There is no right to be let alone that is implicated in this case. Id. Accordingly, if Plaintiffs' Second Amended Complaint can be construed as including a substantive due process privacy challenge to O.C.G.A. § 40-6-315, that due process challenge must fail also. Finally, the Court notes that the applicable regulations merely require Plaintiffs to check to see if their headgear has affixed to it the applicable U.S. Department of Transportation certification. Such a requirement does not seem vague at all. As a matter of fact, it seems a simple way to tell if one's headgear meets the statutory requirements.

Plaintiffs also allege a violation of their equal protection rights protected by the Fourteenth Amendment. Motorcycle riders, however, are not a protected class. Requiring a person who rides a motorcycle to wear a helmet serves a rational purpose. An occupant of an automobile who is wearing a seatbelt is likely to remain in the vehicle in an accident. In contrast, a motorcyclist involved in an accident is much more likely to end up on the pavement with, the chance of a serious head injury. Failure to require motorcyclists to wear appropriate headgear may increase costs to the taxpaying public, and the Georgia General Assembly's desire to limit such costs constitutes a rational purpose for O.C.G.A. § 40-6-315. As Justice Powell, sitting by designation with the Eleventh Circuit explained in Picou v. Gillum, 874 F.2d 1519, 1522 (11th Cit 1989):

> A motorcyclist without a helmet is more likely to suffer serious injury than one wearing the prescribed headgear. State and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense. If permanently disabled, the cyclist could require public assistance for many years. As Professor Tribe has expressed it, "[in] a society unwilling to abandon bleeding bodies on the highway, the motorcyclist or driver who endangers himself plainly imposes costs on others."
>
> Id.

(citations omitted). Motorcycle helmet laws are a permissible means of attempting to reduce this cost. "Legislatures and not courts have the primary responsibility for balancing conflicting interests in safety and individual autonomy." Id. Accordingly, Plaintiffs equal protection argument is without merit.

Second, Defendants contend that Plaintiffs' claims for damages against the individual defendants in their individual capacity are barred by the doctrine of qualified immunity. Section 1983 provides a private cause of action for persons whose rights under the federal constitution have been violated under color of state law. 42 U.S.C. § 1983. The statute confers no substantive rights itself. Instead, it provides "a method of vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-94 (1989). To establish a Section 1983 violation. Plaintiffs must show (1) conduct committed by a person acting under color of state law (2) that deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996).

In response to these claims, the Defendants sued in their individual capacity raise the affirmative defense of qualified immunity. "Qualified immunity shields government officials executing discretionary responsibilities from civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir.1991) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity is a question of law to be decided by the court. The test for qualified immunity is one of "objective-reasonableness" in evaluating the conduct of the government official claiming its protection. "[A]ll but the plainly incompetent or those who knowingly violate the law" find protection in qualified immunity. Id. (citing Malley v. Briggs, 475 U.S. *335,* 341 (1986)).

In Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988), the Eleventh Circuit adopted a two-part analysis for assessing the qualified immunity defense. First, the defendant

public official must prove that he acted within the scope of his discretionary authority when the challenged conduct occurred. Id. at 1563. If the defendant satisfies this part, the burden shifts to the plaintiff to show that the defendant public official's conduct violated clearly established law. Id. at 1564. "That qualified immunity protects government actors is the usual role; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." Lassiter v. Alabama A & M Univ., 28 R3d 1146, 1149 (11th Cir. 1994) (en banc) (citations and emphasis omitted); Redd v. City of Enterprise, 140 F.3d 1378, 1382 (11th Cir.1998).

There is no dispute in this case that the individual Defendants have acted within the scope of their discretionary authority. Plaintiffs themselves state as follows:

> It is Plaintiffs' position, as absolutely supported by the plain language of Subsection (d) of O.C.G.A. § 40-6-3 15, that the individual defendants were given the discretionary authority "... to approve or disapprove protective headgear and eye protection devices required in this Code section and enforce regulations establishing standards and specifications for the approval thereof' which was done so that the Defendants had the lawful authority to approve of protective headgear as being sold to motorcycle riders in the State of Georgia.

(Plaintiffs' Response and Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, at 26-27.) [Doc. 30]

Having established that the Defendants were acting within the scope of their discretionary authority as state actors, the burden shifts to Plaintiffs to demonstrate that Defendants violated clearly established constitutional law. Sims v. Metropolitan Dade County, 972 F.2d 1230, 1236 (LI th Cir. 1992). To overcome qualified immunity, Plaintiffs must show that: (1) Defendants violated a federal constitutional right; and (2) the right was clearly established at the time of the violation. Santamorena v. Georgia Military College, 147 F.3d 1337, 1342 (11th Cir.1998).

In Lassiter, the Eleventh Circuit held that for a law to be clearly established in the qualified immunity context, "preexisting law must dictate, that is truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." Id. at 1150 (emphasis in original). "Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." Adams v. St. Lucie County Sheriff's Dept. 962 F.2d 1563, 1575 (11th Cir. 1992). Finally, plaintiffs must do more than rely on general rules or abstract rights when meeting their burden. Lassiter, 28 F.3d at1150.

Plaintiffs in this case have not satisfied either of these requirements. As discussed above, Plaintiffs have not shown that Defendants violated a federal constitutional right. Plaintiffs First, Fifth and Fourteenth Amendment arguments are without merit. Additionally, Plaintiffs have not shown that, even if a constitutional violation existed, the right was clearly established at the time of

the violation. There is no case law stating that there is a federal constitutional right to a list of approved motorcycle headgear. Accordingly, the individual Defendants sued for damages in their individual capacity are entitled to qualified immunity.

Third, Defendants contend that Plaintiffs' claims for damages against the Board of Public Safety and all individuals in their official capacity are barred by the Eleventh Amendment.[3] Absent a waiver by the state or a valid Congressional override, the Eleventh Amendment bars suits against a state or one of its agencies, departments, or officials when the state is the real party in interest or when monetary recovery would be paid from state funds. Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 389 (1998); Kentucky v. Graham, 473 U.S. 159, 169 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100-01 (1984); Silver v. Baagiano, 804 F.2d 1211, 1213-14 (11th Cir. 1986). Despite its express language, the Supreme Court has construed that the Eleventh Amendment jurisdictional bar to extend to federal suits against a non-consenting state "by her own citizens as well as citizens of another state." Port Auth. Trans-Hudson Corp. v. Feenet 495 U.S. 299, 304 (1990) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984)). Eleventh Amendment immunity can only be overcome through a waiver by the state or a valid congressional ovenide.[4] Wisconsin Dept. of Corrections, 524 U.S. at 389. A

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The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

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It is important to note that a state can create a limited waiver of its immunity by consenting to suit in its own state courts without waiving

waiver, however, must be unequivocal to be valid. "In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that [the State] has waived its constitutional immunity." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). In this case, Plaintiffs do not contend that the State of Georgia has waived its Eleventh Amendment immunity. Neither do Plaintiffs contend that Congress has validly overridden that immunity in this case. Their argument on the Eleventh Amendment issues addresses only whether injunctive relief may be sought against the State, its agencies, and officials acting in their official capacity. The Court has already concluded that there is no constitutional violation for which to grant injunctive relief. Plaintiffs ignore Defendants' argument that Eleventh Amendment immunity bars recovery of monetary damages against the State of Georgia, the Georgia Department of Public Safety, the Board of Public Safety, or the individual Defendants sued in their official capacity. The Court concludes that damages may not be recovered from the State, its agencies or its officials acting in their official capacity because the State of Georgia has not waived its Eleventh Amendment immunity and Congress has not validly overridden it.

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its Eleventh Amendment immunity from suit in federal courts. See Port Authority Trans-Hudson Corp., 495 U.S. at 305. Thus, a state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity under federal law. These two concepts of immunity are distinct. "Each ultimately rest upon separate, albeit related, footing – common law sovereign immunity is determined by state law and Eleventh Amendment immunity is determined under federal standard." In re Allied Signal, Inc., 919 F.2d 277, 280 n.4 (5th Cir. 1990); see also 14 Charles Alan Wright & Arthur R. Miller,, Federal Practice and procedure § 3524 (2d ed. 1984).

Fourth, Plaintiffs' Second Amended Complaint can be construed as claiming that even if Defendants are not violating the Constitution of the United States, they nevertheless are violating Georgia law. Defendants, however, contend that any claim that they are violatig Georgia law is barred by the Eleventh Amendment pursuant to the Supreme Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104-06 (1984). In Pennhurst, the plaintiff attempted to enforce a state's mental health law in federal court. The Supreme Court held that the Eleventh Amendment bars federal courts from enforcing state law either prospectively or retroactively. In writing for the majority, Justice Powell emphasized that "it is difficult to think of a greater intrusion on the state sovereignty than when a federal court instructs officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." Id. at 106. The court agrees that Pennhurst is directly applicable in this case and forbids this court from determining that Defendants are violating Georgia law. Furthermore, the Georgia Court of Appeal in Dowis v. State, 243 Ga. App. 354. 355 (2000), has already determined that "[t]he statute does not require the Board to approve specific types of headgear." Id. Given this determination by the Georgia Court of Appeals on the meaning of state law, it would be a gross intrusion for the Court to undercut that decision.

Fifth, Defendants contend that the plain words of Georgia's statute do not require the Board of Public Safety to approve of disapprove of headgear protection and eye-protection devices or to publish lists of approved equipment. On this ground the court simply notes that the Georgia Court of Appeals has agreed with Defendants in holding that the Board of Public Safety is not required to approve specific types of headgear. Id. A Georgia appellate court has already spoken on

this issue, and the court respects its determination on the meaning of § 40-6-315(d).

g. Notice of Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

U.S.D.C. ATLANTA
APR 26 2001
LUTHER D. THOMAS, Clerk
By Deputy Clerk

ABATE OF GEORGIA, INC.,
and all others similarly situation,

Plaintiffs,

vs.

CIVIL ACTION FILE
NO. 1:00-CV-1682-TWT

STATE OF GEORGIA and GEORGIA
DEPARTMENT OF PUBLIC SAFETY,

Defendants.

NOTICE OF APPEAL

COMES NOW ABATE OF GEORGIA, INC., Plaintiff, by and through undersigned counsel, and tenders Plaintiff's Notice of Appeal from the judgment of the Court as entered on April 4, 2001, to the Eleventh Circuit Court of Appeals. Plaintiff hereby moves the Clerk of the United States District Court to prepare the full record to be transmitted tot he Clerk of the Eleventh Circuit Court of Appeals.

Respectfully submitted,
THE ROBERTS LAW FIRM, P.C.

S/_____
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Georgia Bar No. 608705
Counsel for Plaintiff

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ABATE OF GEORGIA, INC.,
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DEPARTMENT OF PUBLIC SAFETY,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and accurate copy of the forgoing Notice of Appeal upon the following parties by placing a copy of the same into an envelope with sufficient postage to ensure delivery and placing the same into the United States Mail addressed as follows:

Patricia Downing
Senior Assistant Attorney General
40 Capital Square, SW
Atlanta, Georgia 30303-1300

This 20th day of April, 2001.

S/_____
John A. Roberts
Georgia Bar No. 608705
Counsel for Plaintiff

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